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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

TELFORD TAYLOR
60 E. 42nd Street
New York, New York 10017
Tel. (212) 661-0930
Counsel for Appellant

Of Counsel:
WALTER A. BOSSERT, JR.
DAVISON W. GRANT
GOULD & WILKIE
One Wall Street
New York, New York 10005
Tel. (212) 344-5680

TAYLOR, FERENCZ & SIMON
60 E. 42nd Street
New York, New York 10017
Tel. (212) 661-0930

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v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS

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JURISDICTIONAL STATEMENT

Central Hudson Gas and Electric Corporation, the appellant, appeals from the final judgment of the Court of Appeals of the State of New York, entered July 9, 1979, denying rehearing of a judgment entered May 1, 1979 which affirmed judgments of the Appellate Division, Third Department, and the New York Supreme Court, Albany County, and upheld the federal constitutionality of the Public Service Law of New York State as construed and applied by the Public Service Commission of the State of New York in its orders of February 25, 1977 and July 14, 1977 prohibiting electric utility companies subject to the Commission's jurisdiction from promoting the use of electrical energy by advertising. These orders are companions of the order challenged in *Consolidated Edison Co.* v *Public Service Commission* (No. 79-134), probable jurisdiction noted October 1, 1979. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal constitutional questions are presented.

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported in 47 NY 2d 94, 417 NYS 2d 30, and is ap-

pended hereto as Appendix A. The opinion of the Appellate Division, Third Department, is reported in 63 AD 2d 364, 407 NYS 2d 735, and is appended hereto as Appendix B. The opinion of the New York Supreme Court is not reported and is appended hereto as Appendix C. The three opinions of the Public Service Commission are reported in 13 NY PSC 2072, 17 NY PSC 1-R, and 17 NY PSC 17-R and are appended hereto as Appendices D-1, D-2, and D-3 respectively.

Jurisdiction

The appellant (hereinafter "Central Hudson") commenced this action, seeking review of and declaratory relief against the Commission's orders of February 25 and July 14, 1977 under Article 78 of the New York Civil Practice Law and Rules, on November 10, 1977 in the Supreme Court, Albany County. As it had before the Public Service Commission (hereinafter the "Commission"), Central Hudson challenged the order banning promotional advertising as in violation of the First and Fourteenth Amendments to the United States Constitution.[1] The New York Supreme Court rejected Central Hudson's constitutional contentions, affirmed the validity of the Commission's orders, and denied the relief sought. The Appellate Division, Third Department, on July 27, 1978, affirmed the judgment below, and rejected appellant's attacks on the orders as unauthorized by statute and invalid under the federal and state constitutions.

The judgment of the Court of Appeals, rejecting all of appellant's statutory and constitutional contentions and affirming the judgment below, was entered May 1, 1979 (Appendix F-1). Appellant's motion for reargument was timely filed on May 30, 1979, and was denied on July 9, 1979 (Appendix F-2). Appellant's Notice of Appeal to this Court was filed with the Court of Appeals and the New York Supreme Court on August 22, 1979 (Appendix G). This Court's jurisdiction to review the judgment

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[1] The petition to the New York Supreme Court is appended hereto as Appendix E. It also challenged the validity of the order under the state constitution, and other features of the Commission's order not involved in this appeal.

of the Court of Appeals is conferred by 28 U.S.C. §1257 (2). The following cases, *inter alia*, sustain this Court's jurisdiction on appeal: *Williams* v *Bruffy*, 96 US 176, 183; *Live Oak Ass'n.* v *Railroad Commission*, 269 US 354; *Lake Erie & Western R. Co.* v *Public Utilities Commission*, 249 US 422; *Hamilton* v *Regents*, 293 US 245; *Atchison R. Co.* v *Public Utilities Commission*, 346 US 346, 348-49; *Lathrop* v *Donohue*, 367 US 820, 825.

Statutes Involved

The Public Service Commission's initial order banning promotional advertising by electric utility companies, issued December 5, 1973, provides, in pertinent part (App. D-1, p 31a):

> All electric corporations are hereby prohibited from promoting the use of electricity through the use of advertising. . . .[2]

This order was continued in effect by the Commission's orders of February 25 and July 14, 1977, as set forth in Appendices D-2 and D-3, and it is these continuing orders which are challenged in this appeal. The relevant provisions of the New York Public Service Law, held by the Court of Appeals to authorize the promulgation of these orders by the Commission, are set forth in Appendix H.

Questions Presented

The Court of Appeals of New York State rejected appellant's contentions that the Public Service Law gives the Public Service Commission no authority to issue the orders here in question and that the orders are in violation of the First and Fourteenth Amendments to the Constitution of the United States. The questions presented are:

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[2] The remainder of the order treats with promotion of the use of electricity through subsidy payments and employee incentives. Central Hudson is not here contesting the Commission's authority to prohibit such subsidy payments or employee incentives.

Despite the fact that the document establishing the ban is captioned "Notice of Proposal to Issue Order Restricting Certain Uses of Electrical Energy", the portion which referred to the ban on promotional advertising by electric utilities is a final order.

(1) Whether the Public Service Law, as so construed by the Court of Appeals and as applied in this case by the Public Service Commission, and the Commission's orders banning advertising by electric utility companies, facially or as applied to appellant, are in violation of the First Amendment, as made applicable to the States by the Fourteenth Amendment; and

(2) Whether the Public Service Law, as so construed and applied, and the Public Service Commission's orders, facially or as applied, are in violation of the Equal Protection clause of the Fourteenth Amendment.

Statement of the Case

The New York Public Service Commission's initial order banning "promotional advertising" by electric utility companies,[3] was issued in December, 1973, at the height of the oil supply constraint consequent upon the Arab oil embargo following the October 1973 Arab-Israeli conflict, and was based on the Commission's conclusion that the electric utility system in New York State "does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973-74 winter." (App. D-1, p 26a).[4] At about the same time the Commission ordered a state-wide voltage reduction (13 NY PSC 2183). The latter order was rescinded on March 29, 1974 after the Arab

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[3] In 1970 and 1971 the Commission had banned promotional advertising respectively by telephone and gas companies, at a time when lack of telephone capacity and natural gas supplies jeopardized continuing service to existing customers. On June 21, 1972 the Commission declined to impose a similar advertising prohibition on electric utilities (12 NY PSC 108-R). The ban on telephone company advertising was lifted in March, 1973 (13 NY PSC 461). The ban on gas promotional advertising has recently been lifted for some but not all gas utilities due to the recent increased availability of natural gas.

[4] The validity of the Commission's original ban of December, 1973 on promotional advertising is not in question on this appeal. At the time of its issuance there was real doubt that fuel supplies would remain sufficient even to maintain existing service, and there was no reason for Central Hudson to contemplate promotional advertising.

oil embargo had been lifted, and upon a finding that New York electric utilities had "substantial inventories" of fuel (14 NY PSC 551); the advertising ban, however, remained in effect.

Opposition to continuance of the ban was publicly voiced, and on July 28, 1976 the Commission issued a "Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices" (the pertinent provisions of which are appended hereto as Appendix I). Numerous written comments were received, including Central Hudson's letter of September 10, 1976 (R. 111-13),[5] urging that the ban be lifted on grounds both of policy and of constitutional law as then recently determined in *Va. Pharmacy Bd.* v *Va. Consumer Council*, 425 US 748 (1976). No evidentiary hearing or adversary process was given, despite requests to that effect by the Attorney General and the Consumer Protection Board of New York State (R. 645 and 502).

On February 25, 1977, the Commission issued its "Statement of Policy on Advertising and Promotional Practices of Public Utilities" (App. D-2, p 32a), directing that "the existing ban on promotion of electricity sales shall be continued". There was no evidence before the Commission of any shortage of fuel oil or electrical capacity; the Commission relied primarily on its conclusion that (App. D-2, p 37a) increased use of electrical energy "would aggravate the nation's already unacceptably high level of dependence on foreign sources of supply and would, in addition, frustrate rather than encourage conservation efforts". Dr. Alfred E. Kahn, the then Commission Chairman, concurring "with the greatest reluctance and distaste", relied also on the ground that promotion of electricity usage would cause an increase in peak consumption which, under the existing rate structure, "is artificially subsidized." (App. D-2, p 51a).

On March 28, 1977 Central Hudson petitioned the Commission for a rehearing. This and other such petitions were denied by the Commission in an opinion and order issued July 14, 1977 (App. D-3). The Commission relied primarily on the ground previously voiced by Chairman Kahn, i.e. that the existing "im-

[5] References to the record before the New York Court of Appeals are designated "R."

perfectly structured electric rates" do not "fully reflect the much higher marginal costs of on-peak consumption", and that: "The promotion of electric consumption at rates that do not reflect the costs of it to society is not the kind of commercial speech contemplated by *Virginia Board of Pharmacy*." (App. D-3, p 58a).

Thereafter, Central Hudson commenced the present action, as described above.[6] In the New York Supreme Court, the ban on promotional advertising was upheld solely on the ground (originally set forth by Chairman Kahn) that "because of inefficient rate structure" increased peak usage of electricity would not be "properly priced", and that therefore the ban "advances a significant public interest" sufficient to justify the incursion on First Amendment values (App. C, p 23a). Affirming, the Appellate Division, Third Department, cited, as establishing a "compelling" state interest in the ban, three matters relied on by the Commission, to wit: (1) increased use of electricity would cause "spiraling price increases due to the fact that present rates do not cover the marginal cost of new capacity"; (2) advertising "provides misleading signals" that energy conservation is unnecessary; and (3) additional usage will "increase the level of dependence on foreign sources of fuel oil." (App. B, p 19a).

On appeal, the Court of Appeals rejected Central Hudson's threshold challenge to the statutory authority of the Commission (which had also been raised below), ruling (App. A, pp 3a-7a) that "the legislature has conferred vast power upon the Public

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[6] In the New York courts, Central Hudson challenged other features of the Commission's order of February 25, 1977, including the prohibition on the use of bill inserts for the discussion of "controversial matters of public policy", presently challenged in this Court in *Consolidated Edison Co.* v. *Public Service Commission* (No. 79-134). These other questions are not involved in Central Hudson's present appeal.

This appeal raises no question with respect to payment for the costs of promotional advertising. The Commission's ban applies regardless of how the costs of promotional advertising are allocated. Pursuant to Section 113(b)(5) of the Public Utility Regulatory Policies Act of 1978, 42 U.S.C. §2623(b)(5), a Federal standard is established, for consideration by state regulatory bodies, requiring that the costs of promotional advertising be borne by the shareholders or other owners.

Service Commission", including "general supervision" of electric utilities, and the duty "to encourage . . . the preservation of environmental values and the conservation of natural resources." The prohibition of promotional advertising was held to be a "reasonable measure" to "prevent wasteful consumption or unneeded expansion of utility services."

Turning to the First Amendment issue, the Court of Appeals acknowledged (App. A, p 10a) that the Commission's ban "works a direct curtailment of expressional activity: an entire category of speech is prohibited because of its potential impact upon the society", and that such regulations "have been subjected to an exacting standard of review, the precise level of that standard being determined by reference to the nature of the communication." However, relying principally on *Ohralik* v *Ohio State Bar Ass'n.*, 436 US 447, the Court of Appeals ruled that (App. A, p 13a) "the ban on promotional advertising of electricity is consistent with First Amendment strictures".

In support of this conclusion the Court of Appeals first cited the "extensive government regulation" to which public utilities are generally subjected, and then concluded that since there is no "competitive shopping" for electricity on the basis of price, because the rates are fixed by the Commission, promotional advertising conveys no information of value to the recipient. Furthermore, in view of "the present energy crisis" (of which the Court took judicial notice), such communications might be "affirmatively detrimental" and "exacerbate the crisis". This hazard, said the Court, "constitutes a compelling justification for the ban".

Central Hudson's motion for reargument was denied without opinion.

This Court has Jurisdiction of this Appeal

The Court of Appeals of the State of New York is the highest Court of the State and its judgment against appellant is final. *Board of Commissioners* v *Lucas*, 93 US 108. The Public Service Law is a statute of New York State, and the Commission's order is a "statute of any state" within the meaning of

28 U.S.C. §1257(2). *Lake Erie & Western R. Co.* v *Public Utilities Commission,* 249 US 422, and other cases cited *supra* p 3. Central Hudson's petition in the Supreme Court, Albany County, explicitly draws in question the validity of the Commission's order, banning promotional advertising by electric utilities, under the First and Fourteenth Amendments to the United States Constitution (App. E, p 70a). In the Court of Appeals, Central Hudson argued (Br. 2, 17) that if the Public Service Law were construed to authorize the Commission's orders, that law would, under these Amendments, be unconstitutional as so construed and applied. After the Court of Appeals had so construed the statute in its opinion and judgment, Central Hudson, in its petition for reargument, repeated the contention. The Court of Appeals held that the delegation of power to the Commission to issue the orders is constitutionally valid, and explicitly upheld the constitutional validity of the Commission's orders (App. A).

The Federal Questions are Substantial

Central Hudson contends that the Commission's order prohibiting all "promotional advertising"[7] by electric utilities is plainly unconstitutional under the principles repeatedly laid down by this Court in the *Virginia Pharmacy* case, *supra,* and its other recent decisions dealing with so-called "commercial speech." Making full allowance for the "commonsense differences" between commercial and other varieties of speech remarked in the *Virginia Pharmacy* case, 425 US at 771, *Bates* v *State Bar of Arizona,* 433 US 350 at 381, and *Friedman* v *Rogers,* —US—, 99 S. Ct. 887 at 894, there is no feature of the present case which renders the caveats voiced in those cases even remotely applicable. The Commission's order applies to speech which is entirely truthful, and lawful in all respects save under the order

[7] While the term employed by the Commission to describe the type of advertising which it has prohibited is "promotional advertising", this definition encompasses a broad range of informational activities, from those whose sole purpose is to increase existing types of consumption, to those which inform customers of new or little known uses of electricity which they may find beneficial and which incidentally may increase the consumption of electricity. (See pp 20-1 *infra.*)

itself. The order bans speech which advocates no unlawful conduct, and is neither fraudulent, deceptive, obscene, libelous, nor provocative of violence. It bans speech unaccompanied by any action other than that inherent in the utterance itself. The order is not a regulation of "time, place and manner"; its limits are fixed exclusively by the content of the speech and, given the prohibited content, the ban is absolute and all-inclusive. Furthermore, as we will show, it bans speech which does much more than propose a commercial transaction.

However, in this case (for the first time in this Court) protection for commercial speech is invoked by a regulated public utility corporation. We believe that it is primarily this circumstance which, despite the teaching of *First National Bank of Boston* v *Belotti*, 435 US 765, has led the New York state courts into grievous error in their disposition of the constitutional issues in the present case. The circumstance that Central Hudson has a rate-regulated monopoly in the sale of *electrical* energy in its operational area caused the Court of Appeals to infer, quite wrongly, that Central Hudson's advertising could have no "beneficial informative content", and its right to First Amendment protection was therefore at the "nadir" (App. A, pp 12a-13a). In fact, for the supplying of heat and power, electric energy is in sharp (and so far unsuccessful) competition with both oil and natural gas, and price is one, but by no means the only, factor involved in this competition.[8]

Central Hudson asserts, therefore, that its promotional speech is entitled to substantial protection under the First Amendment, and that the relation between its advertising and the present energy crisis is so tenuous and quantitatively insignificant that

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[8] In this connection, we invite the Court's attention to District Judge Pratt's opinion in *Long Island Lighting Co.* v *Public Service Commission*,—F. Supp—(E.D.N.Y., Docket No. 77C972, March 30, 1979), holding the Commission's promotional advertising ban unconstitutional under the First Amendment. Relevant portions of the opinion in that case, which is now pending in the Court of Appeals for the Second Circuit, are appended hereto as Appendix J.

the State's interest is wholly insufficient to justify the ban.[9] We further assert that, since the Public Service Law of New York confers wholly different types of authority on the Commission, and makes no reference to limitations on utility companies' speech or anything comparable, the construction placed on the statute by the Court of Appeals has resulted in a delegation to the Commission which is wholly lacking in guiding standards, and therefore unconstitutional as both vague and overbroad.[10] We contend, finally, that in the light of the conservation goals on which the Court of Appeals primarily relied, the Public Service Law as construed and as applied here by the promotional advertising ban, which affects only electric utilities and not their far more successful competitors in the supply of heat, is a violation of the equal protection clause of the Fourteenth Amendment.

1. *Central Hudson's First Amendment Right to Engage in Commercial Advertising is Not Destroyed by Its Status as a Regulated Public Utility Corporation.* In the *Belotti* case, *supra*, the Massachusetts statute severely limited the right of numerous specified types of corporations (including banks, public utilities,[11] and business corporations) to spend money in order to influence elections or referenda. Holding that the statutory restrictions were in violation of the First Amendment, the Court (per Powell, J.) observed (435 US at 775-76):

> The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amend-

[9] As we show below, the promotional advertising ban is unique to the State of New York. Neither the federal government nor any other state is imposing any such prohibition.

[10] As shown hereinafter, affirmance of the decision below would therefore work an enormous expansion into the speech field of the powers of the numerous state public utility commissions operating under statutes comparable to the New York Public Service Law.

[11] Appellants in the *Belotti* case included two banks and three business corporations, but no public utilities. However, there is nothing in the wording or logic of the Court's opinion to suggest that the ruling or opinion would have been different as applied to public utility corporations.

> ment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect. We hold that it does.

The fact that the *Belotti* case concerned "political" and the present case "commercial" speech subtracts nothing from the force of the point made: that the test is not the identity of the communicator but the First Amendment interests of the communicants. Indeed, Justice White, dissenting (with Justices Brennan and Marshall), thought that the communicants' interests would have been greater had the speech been commercial-promotional (435 US at 807-8):

> I recognize that there may be certain communications undertaken by corporations which could not be restricted without impinging seriously upon the right to receive information. In the absence of advertising and similar promotional activities, for example, the ability of consumers to obtain information relating to products manufactured by corporations would be significantly impeded.

Accordingly, the emphasis laid by the New York court upon the "regulated and franchised" status of public utilities, as justifying restricting their right of speech, is misplaced, for these characteristics do not determine the communicant interests involved in utility advertising. Furthermore, just as the banks in the *Belotti* case were under "extensive government regulation" (App. A, p 13a), so were the pharmacists in the *Virginia Pharmacy* case (425 US 748, 750-51) and *Carey* v *Population Services*, 431 US 678, 701 (1977), as well as the lawyers in *Bates* v *State Bar of Arizona*, 433 US 350, 353 *et seq.* In all these cases the ban on advertising was invalidated.

Nor do the *Ohralik* case, 436 US 447, and other decisions noting "commonsense differences" between commercial and other speech, support the validity of the Commission's promotional ban, for none of the factors remarked or relied on in those cases are relevant to the present one. The *Virginia Pharmacy* case, 425

US at 771, referred to "deceptive or misleading" advertising, as did also the *Bates* case, 432 US at 383-84. The *Ohralik* case, 436 US 447, particularly relied on by the Court of Appeals (App. A, pp 12a-13a), and *In re Primus*, 436 US 412, both turned on the characteristics of in-person solicitation of a lawyer-client relation, and weighted the hazards of (436 US at 461): ". . . stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the client in the form of overreaching, overcharging, underrepresentation, and misrepresentation." The decision in *Friedman* v *Rogers, supra*, 99 S. Ct. at 897, involved the allegedly deceptive and misleading use of optometrical trade names.

The Commission's ban on promotional advertising is not directed at any of these problems or hazards. It is a total ban on all such advertising, regardless of its character, quality, style, or purpose.

The remaining argument presented in the New York Court's opinion (App. A, p 13a), for reducing Central Hudson's First Amendment rights to the "nadir", is that Central Hudson operates in a "noncompetitive market" wherein, due to rate regulation, "the price of electricity simply may not be reduced by competitive shopping". This point has not arisen in any of the Court's prior commercial speech cases. The legal merits of the argument, we believe, need not be pursued, because it rests upon a wholly mistaken view of the market in which Central Hudson operates and with which the Commission is concerned.

It is true, of course, that Central Hudson is the sole distributor of electrical energy in its operational area, and that the price is fixed by the Commission. But, in the market sense, customers do not buy electrical energy for its own sake, but for its use as heat, light, and power. And while electrical energy does furnish virtually all light, it is in intense competition with other forms of energy in supplying heat and power.[12] Furthermore, it is apparent

[12] Of total end use energy consumption estimated for 1978 in New York State, electric energy only represents 11.5%. Petroleum products, used primarily for heating and transportation, account for 67.5%, natural gas, used primarily for cooking and heating accounts for 18.3%, and the remaining 2.7% represents other sources of energy. See *Draft Report, New York State Master Energy Plan*, New York State Energy Office, August 1979, Figure IV-14.

from the Commission's two opinions continuing in effect the promotional ban (Apps. D-2, D-3), that the Commission was primarily concerned with the use of electricity for space and water heating and air conditioning.

In the market for space and water heating, there is intense competition between electricity, natural gas (which Central Hudson also distributes), and house heating oil. Electricity has the smallest share of the three, and electricity and natural gas together have less than one-quarter of the market.[13] Each of the three rival energy sources has comparative advantages and disadvantages, in terms of both price and quality. The significance of all this for First Amendment purposes was well described by Judge Pratt in the *Long Island Lighting* case (App. J, pp 92a-93a):

> Beyond LILCO's economic interest is the public's interest in the free flow of information on the use of electrical energy for home heating. The consumer has a substantial interest in receiving truthful information on electric space heating. Not only does promotional advertising provide information of general public interest concerning electrical energy, it also affects an individual's economic decisions on the benefits and detriments of electric heat. Choosing among oil, gas, or electric residential heating may significantly affect his budget and daily comfort. Moreover, the public in general has an interest in receiving information on the various methods of heating, in order to utilize energy sources ecologically and efficiently.[14]

Furthermore, there are innovative applications of electrical energy for space heating, such as heat pumps, and with advancing technology, self-generating energy sources such as private hydro, solar, and windmill systems, for which electricity is the

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[13] In 1978 in Central Hudson's service territory, residential heating was 9.3% electric, 12.4% gas, and 78.3% oil. See Central Hudson's Annual Report for the Year Ended December 31, 1978 to the Public Service Commission. Natural gas distribution facilities are available in Central Hudson's service territory only in and adjacent to cities. Consequently due to the predominately non-urban character of Central Hudson's service territory, a majority of customers only have the choice between oil or electricity for heating.

[14] See also comparable portions of Chairman Kahn's separate opinion (App. D-2, pp 49a-51a).

most appropriate supplement or back-up, are becoming practical. Central Hudson is well informed on these subjects, and if what it has to say may be affected by self-interest, that in no way limits its right to speak. See *Eastern R.R. Presidents' Conference* v *Noerr Motors Freight,* 365 US 127, at 139: "Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act." So must individuals. Whether or not Central Hudson's voice is heeded, it is entitled under the First Amendment to be heard, and its stifling by the Commission's order cannot be justified by the fact that the voice is that of a public utility corporation.

2. *The State Interests Asserted by the Commission and the New York Courts are Insufficient to Justify the Suppression Accomplished by the Commission's Order.* Although the Public Service Commission and the lower New York courts relied on three separate reasons to support the promotional ban, the Court of Appeals wholly ignored two of them, and we believe they merit no consideration in this Court.[15] The sole state interest relied on by the Court of Appeals was described as follows (App. A, pp 13a-14a):

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[15] One of these contentions is based on the "marginal cost" principle, i.e. that since utility companies use their most economical sources first, and the less efficient only as increased demand requires, the unit costs are highest during peak demand periods. A rate system based on average cost does not reflect this factor, and results in off-peak users subsidizing on-peak users. (See App. D-2, pp 50a-52a, and D-3, pp 57a-59a.) Seasonal and time-of-day differential rates mitigate the inequity, if such it is. The problem exists irrespective of the possible effect of promotional advertising, and is aggravated by any rise in demand, regardless of its cause. The Commission has ample power to deal with the matter through its rate-making authority. *Matter of New York State Council of Retail Merchants* v *Public Service Commission,* 45 NY 2d 661, 412 NYS 2d 358 (1978).

The other argument is that promotional advertising "provides misleading signals that conservation is unnecessary" (App. B, p 19a, and D-3, p 57a). The notion is not that the content of such advertising is misleading, but that the public will draw an incorrect inference from the fact of the advertisement. Like contentions were summarily rejected by this Court in the *Virginia Pharmacy* case, 425 US at 769-70 and 773; the *Bates* case, 435 US at 374-75; and *Linmark Associates* v *Willingboro,* 431 US 85, at 96-97.

> It would not strain the bounds of judicial notice for us to take cognizance of the present energy crisis. Conserving diminishing resources is a matter of vital state concern and increased use of electrical energy is inimical to our interests. Promotional advertising, if permitted, would only serve to exacerbate the crisis. In short, this constitutes a compelling justification for the ban.

Assuredly, oil conservation is a most important national policy, but the question remains whether or not the promotional advertising ban will measurably contribute to its fulfillment. The Commission itself made but a faintly affirmative claim (App. D-2, p 37a), acknowledging that the promotional ban "may aptly be described as piecemeal conservationism since promotion of oil for use in heating or internal combustion applications is not similarly proscribed", and that the ban "will be less than optimally effective, in a national context", while lamely concluding that it "will result in some dampening of unneccessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales."

Now, if this were a case such as *Wickard* v *Filburn*, 317 US 111, in which a general and nationwide prohibition is enforced against persons whose individual impact on the problem is negligible, on the basis that the impact of many such persons is substantial, the New York regulation, whether or not constitutional, might be rationally related to its avowed aim. But the present case is not in that posture, for *no other state is imposing a similar ban*. In no state save Oklahoma has a like prohibition ever been imposed—even in 1973 at the time of the Arab oil embargo—and in Oklahoma the promotional advertising ban was held invalid as "arbitrary". *State* v *Oklahoma Gas & Electric Co.*, 536 P2d 887, 895 (Okla. 1975).[16]

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[16] In Nebraska, where electric utilities are publicly owned, a promotional advertising ban for other privately owned utilities was considered, but discarded after the State Attorney General ruled that such a ban would be unconstitutional as an impairment of freedom of speech. Neb. Op. Att'y Gen. No. 8 (1979).

Furthermore, the "present energy crisis" of which the New York court took notice, is a national problem dealt with primarily by policies fixed at the national level. Federal energy policies do not prohibit promotional advertising by electric utilities, and by plain implication recognize their legitimacy. Section 113(b)(5) of the Public Utility Regulatory Policies Act of 1978, 42 U.S.C. §2623(b)(5), provides: "No electric utility may recover from any person other than the shareholders (or other owners) of such utility any direct or indirect expenditure by such utility for promotional or political advertising . . ." The incompatibility of this provision with prohibition of promotional advertising is confirmed in the Report of the Joint Conference Committee, which explicitly states that no prohibition of either promotional or political advertising by electric utilites was intended.[17]

Thus the Commission's concern for the effect of electric utility advertising on the energy crisis is shared neither by the federal nor the other state governments. Given these circumstances, together with the freedom of Central Hudson's oil furnace competitors to cry their wares, and the public tolerance of flashy television advertisements for powerful cars and potent gasoline, inviting consumer spending for services far less necessary than home heating, it is nothing short of ludicrous to describe the Commission's order as serving any substantial, let alone compelling, state interest in terms of oil conservation.

3. *The Order, and the Public Service Law as Construed and Applied by the New York Courts, are Unconstitutional for Vagueness, Overbreadth, and Lack of Standards.* The provisions of the New York Public Service Law (McKinney 1955; Supp. 1978) (App. G) empowering the Public Service Commission to regulate electric utility companies closely resemble those of at least 28

[17] Pertinent extracts from the United States Congressional Committee Reports relating to Section 113(b)(5) of the Public Utility Regulatory Policies Act of 1978 and its predecessor bill are appended hereto as Appendix K.

jurisdictions, including the District of Columbia.[18] The Commission is given (Section 4, subd. 1) "all powers necessary or proper to enable it to carry out the purposes" of the Law; it is directed (Section 5, subd. 2, added in 1970) to "encourage" the companies subject to its jurisdiction to plan and carry out their functions

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[18] The approximately 48 states which regulate investor owned electric utilities grant their respective public utility regulatory bodies general supervisory powers over such utilities. In addition, the following 28 statutes grant their public utility regulatory bodies implied powers similar to the "powers necessary and proper" confered upon the Commission by New York Public Service Law §4, subd. 1 (McKinney 1955) and upon which the New York Court of Appeals based its determination that the Commission had authority to promulgate the ban on promotional advertising: Ala. Code tit. 37, §37-1-31 (1977); Alaska Stat. §42.05.151 (1978); Ariz. Rev. Stat. §40-202(a) (1974); Ark. Stat. Ann. §73-202 (1957); Cal. Public Utilities Code §701 (West 1975); Conn. Gen. Stat. Ann. §16-6b (West Supp. 1979); D. C. Code Encycl. §43-1003 (West 1968); Fla. Stat. Ann. §366.05 (West 1968); Idaho Code §61-501 (1976); Iowa Code Ann. §476.2 (West Supp. 1979); Kan. Stat. §66-101 (1972); La. Rev. Stat. Ann. §45:1164 (West 1979); Md. Ann. Code art. 78 §1 (Supp. 1978); Mich. Comp. Laws Ann. §460.6 (1967); Miss. Code Ann. §77-3-45 (1972); Mont. Rev. Codes Ann. §70-104 (Supp. 1977); N.M. Stat. Ann. §62-6-4 (1978); N.C. Gen. Stat. 62-30 (1975); N.D. Cent. Code §49-02-02(2) (1978); Okla. Stat. Ann. tit 17 §153 (West 1953); Or. Rev. Stat. §756.040(2) (1975); Pa. Cons. Stat. Ann. tit 66, §501-(b) (Purdon Supp. 1979); R.I. Gen. Laws §39-1-38 (1977); S.C. Code §58-27-150 (1977); Tex. Rev. Civ. Stat. Ann. art 1446(C) (Vernon Supp. 1978); Utah Code Ann. §54-4-1 (Supp. 1979); Wis. Stat. Ann. §196.02 (West 1957); and Wyo. Stat. §37-2-127 (1977).

While the Court of Appeals cited New York Public Service Law §5, subd. 2, which empowers the Commission to "encourage" conservation, in its discussion of the authority of the commission to issue the order, it is difficult to understand how a statute which authorizes a governmental body to "encourage" the companies it regulates adds substantively to its own powers. Statutes in at least five states empower their respective public utility regulatory bodies to consider or encourage conservation, in a manner analogous to New York Public Service Law §5, subd. 2 (McKinney Supp. 1978): Colo. Rev. Stat. §40-2-117 (Supp. 1978); Md. Ann. Code art. 78, §56 (Supp. 1978). Nev. Rev. Stat. §703.260(4) (1979); Ohio Rev. Code Ann. §4905.70 (Anderson Supp. 1978); and Pa. Cons. Stat. Ann. tit 66, §308 (Purdon Supp. 1979).

"with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources"; it is endowed (Section 66, subd. 1) with "general supervision" of all electric corporations, and is empowered to order (Section 66, subd. 2) such "reasonable" service improvements "as will best promote the public interest, preserve the public health and protect" customers and employees, to prescribe uniform accounting methods (Section 66, subd. 4) and "just and reasonable rates" (Section 66, subd. 5) and to fulfill a variety of administrative and investigative duties ancillary to the specified substantive powers.

These are the provisions which the New York courts have now construed as authorizing the Commission to prohibit advertising by electric public utilities. The construction so placed on the New York Public Service Law is, of course, beyond the province of this Court to review, but the *fact* of the construction is directly relevant to the federal constitutionality of the Commission's orders, and of the Law itself as so construed and applied.

It is apparent that the Public Service Law sets forth no standard appropriate for or sufficient to sustain a delegation of authority to the Commission to determine what the companies subject to its jurisdiction may or may not say publicly. Standards such as "public interest" or "public welfare" are accepted as sufficient for rate and other economic legislation, but are wholly insufficient for prohibiting speech regulation. In *Hannegan* v *Esquire*, 327 US 146, the Postmaster General contended that a federal statute authorized him to suspend second class mailing permits for publications if he had determined that they did not contribute "positively' to the "public good or public welfare". This Court refused so to construe the statute, saying it would be tantamount to deciding whether a publication's contents were "good" or "bad", and added (327 US at 151): "To uphold the order of revocation would, therefore, grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be lightly inferred."

This Court has emphasized that in the First Amendment area the "government may regulate . . . only with narrow specificity." *NAACP* v *Button*, 371 US 415, 433. Thus a delegation of power to regulate speech requires much more precise guiding standards than might pass muster in other areas. *Hynes* v *Borough of Oradell*, 425 US 610; *Coates* v *Cincinnati*, 402 US 611; *Keyishian* v *Board of Regents*, 385 US 589; *Lovell* v *Griffin*, 303 US 444. Otherwise such delegation would allow government officials "to pursue their personal predilections." *Smith* v *Goguen*, 415 US 566, 575.

The Court of Appeals has done nothing to narrow, by construction, the circumstances in or purposes for which the Commission may prohibit or otherwise limit speech. It relied on the "present energy crisis" as justifying the promotional advertising ban, but said nothing to suggest that other state interests might not support the promotional advertising ban or other speech limitations. The Commission and the lower New York courts relied on other factors, and their invocation of the "marginal cost" theory, by its logic, would justify a promotional advertising ban at any time the Commission deemed the rate structure incongruent with real costs. The Court of Appeals did not negate other justifications which might be put forward by the Commission for restricting the speech of companies subject to its jurisdiction.[19]

Apart from the lack of guiding standards in the authorizing legislation, the Commission's order itself suffers from both vagueness and overbreath. In part this is probably the consequence of the wholly insufficient evidentiary procedures and record on which the order is based. The Commission's initial order in 1973 was based on general information and inference concerning the effect of the Arab oil embargo on the supply of oil for electric generation (App. D-1). Although the factual situation

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[19] The New York courts' cavalier disregard of these questions of precision and authority may be compared with the thoughtful treatment of a comparable problem in the Supreme Court of Idaho's recent decision in *Washington Water Power Co.* v *Kootenai Environmental Alliance and Idaho Public Utilities Commission.* — Ida. —, 591 P. 2d 122, 128-9 (1979).

on which the order was based did not last beyond the spring of 1974, in 1977 the Commission continued the ban on the basis of comments received by mail. The suggestion of the State Attorney General and State Consumer Protection Board, that an evidentiary hearing be held, was disregarded. In the *Belotti* case, 435 US at 789, Justice Powell referred critically to the lack of any "record or legislative findings" in support of the challenged statute. In the present case, the legislature has never considered, much less acted upon the promotional advertising ban, and this, together with the lack of any evidentiary record made by the Commission, has basically flawed the decision-making process.

For whatever reason, the Commission's inclusive and unqualified order is fatally overbroad.[20] Although it is apparent from its opinions that the Commission was concerned primarily if not exclusively with space heating and cooling, it made no effort to confine its order to that area. For example, the order covers the use of electricity for lighting, which uses far less energy that what is required for heating and airconditioning, and which involves safety and human efficiency and productivity values. The order also applies to the use of electricity for power; it would prohibit Central Hudson from promotional advertising of electric vehicles, despite their energy economy and pollution-free performance. Furthermore, the order applies to the promotion of devices and methods for the use of electricity in ways which diminish the use of oil, as where electricity is used to power energy-efficient new devices such as the heat pump, or, in small quantities, to supplement solar or windmill heating systems.

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[20] We are mindful of the passage in the *Bates* opinion (433 US at 380-81) holding that the "overbreadth doctrine" does not apply to "professional advertising". But there the Court was discussing overbreadth in regard to its relaxation of the standing limitation, so that a party whose own conduct is not constitutionally protected is allowed to challenge a statute on the ground of its possible application to others whose conduct would be constitutionally protected. No standing problem is involved in the present case, since the Commission's ban is absolute, it applies directly to Central Hudson, and no assertion is made that Central Hudson has not observed its terms.

Furthermore, despite its all-inclusive coverage, the order is vague in that the contours of "promotional advertising" are foggy. Does it cover a consultation initiated by an officer of Central Hudson with an industrial concern on improved and expanded lighting? A speech by the president of Central Hudson to a businessmen's club describing various ways in which electricity can serve their needs? Would it be permissible for Central Hudson to launch a public attack on the wisdom of the Commission's order, when the most publicly effective means of attack would be to portray the diverse uses and other merits of electrical energy? Under the challenged order, the management of Central Hudson is continually faced with questions of this nature in which it must determine whether informational activities in which it wishes to engage are proscribed by the order or not. This, Central Hudson believes, improperly places a cloud over a matter which should be relatively unrestricted, namely the furnishing of truthful information to others about its business.

The result of the decision in the Court of Appeals is that the Commission has been allowed to exert prohibitory authority in the sensitive area of freedom of speech, although the New York legislature has never considered the conferring of such authority and there are no appropriate legislative guidelines for its exercise. Since comparable statutes prevail in a majority of the states, affirmance by this Court may well result in similar assertions of authority by state public utility commissions in many other states, and involve them in problems for which their traditional areas of expertise are wholly unsuited.[21] The lack of governing standards here is reflected in an unqualified order with no evidentiary basis, and thoughtlessly vague and overbroad.

4. *The Order and the Authorizing Statute are Unconstitutional under the Equal Protection Clause.* As the Commission

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[21] Cf. The view of the Supreme Court of Idaho in the *Washington Water Power* case, *supra,* addressed to the type of regulation at issue in the *Consolidated Edison* case now pending in this Court: "The subject matter of the Commission's order at issue here does not deal with the subject matter traditionally regulated by public utility commissions and does not fall into a category of regulation which requires the technical expertise of a commission as contrasted with a legislature." 591 P. 2d at 129.

itself recognized (App. D-2, p 37a), the promotional ban to which appellant is subject does not apply to Central Hudson's non-utility competitors, such as oil furnace and heating oil distributors. In the light of the purpose—i.e., oil conservation—on the basis of which the Court of Appeals sustained the order, we submit that the discrimination thus worked between electric utilities and their competitors is irrational, undermines the plausibility of the "compelling interest" so relied on by the Court of Appeals, and violates the equal protection clause of the Fourteenth Amendment.

It is true, of course, that oil furnace heating enterprises are not subject to the Commission's jurisdiction. But its lack of authority over these dealers is not constitutionally significant except to show that it is the state government as a whole, and not the Commission alone, which is responsible for the discrimination. The Court of Appeals has interpreted New York law as authorizing limitations on advertising by utilities but not by their competitors, and that is the discrimination here challenged.

The constitutional validity of the discrimination must be assessed in the light of the objective the order purports to advance. Since over three fourths of all residential heating in Central Hudson's service area is accomplished by individual oil furnaces, the exclusion of direct oil heating from a prohibition, the purpose of which is to limit the use of oil, is irrational on its face. The situation is an aggravated version of the one confronting this Court in the *Belotti* case, where (435 US at 793-95) the prohibition applied to banks, utilities, and business corporations but not to "entities or organized groups" with "resources comparable to those of large corporations." The discrimination caused Justice Powell, writing for the Court, to observe (435 US at 793): "Thus the exclusion of Massachusetts business trusts, labor unions, and other associations undermines the plausibility of the State's purported concern for the persons who happen to be shareholders in the banks and corporations covered [by the statute]."

This Court's decisions have long recognized a close relation between equal protection and freedom of speech in other cases where speech restrictions were applied in a discriminatory way. *Williams* v *Rhodes*, 393 US 23; *Cox* v *New Hampshire*, 312 US 569, 576; *Cox* v *Louisiana*, 379 US 536, 558. In the latter case

Justice Black, concurring separately in this portion of the decision, and speaking of a statute which prohibited obstruction of traffic while excepting labor union picketing from its scope, wrote (379 US at 581): "This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment." See also *Erznoznik* v *City of Jacksonville*, 422 US 205, 215; Kalven, *The Concept of the Public Forum*, 1965 Sup. Ct. Rev. 1, 30.

A comparable situation, confronting the Court more recently, involved a Chicago ordinance which exempted peaceful labor picketing from a general prohibition of picketing within 150 feet of a school. *Police Department of Chicago* v *Mosley*, 408 US 92. Holding the ordinance unconstitutional, Justice Marshall wrote for the Court (408 US at 95-96):

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. * * * *
>
> Necessarily . . . under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.

It is plain from these and other cases that the equal protection standard of review is strict in cases such as the present one, where First Amendment impingements are involved. In the *Mosley* case, *supra*, the Court stated that (408 US at 101): "The Equal Protection Clause requires that statutes affecting First Amendment rights be narrowly tailored to their legitimate objectives." And in *San Antonio Ind. School Dist.* v *Rodriguez*, 411

US 1, the Court's opinion (per Powell, J.) referred approvingly to the *Mosley* case, saying (411 US at 34, n. 75): "The stricter standard of review was appropriately applied since the ordinance was one 'affecting First Amendment interests'." See also the comparable statements by the other Justices, 411 US at 61 (Stewart, J.), 63 (Brennan, J.), and 112-15 (Marshall, J.).

There is no rational, let alone compelling, interest to justify the discrimination here in question, and accordingly the Public Service Law as construed and the Commission's order, taken together, should be held invalid under the equal protection clause.

Conclusion

Appellant respectfully submits that the federal questions presented by this appeal are substantial and of public importance.

Respectfully submitted,

TELFORD TAYLOR
60 E. 42nd Street
New York, New York 10017
Tel. (212) 661-0930
Counsel for Appellant

Of Counsel:

WALTER A. BOSSERT, JR.
DAVISON W. GRANT
GOULD & WILKIE
One Wall Street
New York, New York 10005
Tel. (212) 344-5680

TAYLOR, FERENCZ & SIMON
60 E. 42nd Street
New York, New York 10017
Tel. (212) 661-0930

October, 1979

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

APPENDIX TO JURISDICTIONAL STATEMENT

TELFORD TAYLOR
60 E. 42nd Street
New York, New York 10017
Tel. (212) 661-0930
Counsel for Appellant

Of Counsel:

WALTER A. BOSSERT, JR.
DAVISON W. GRANT
GOULD & WILKIE
One Wall Street
New York, New York 10005
Tel. (212) 344-5680

TAYLOR, FERENCZ & SIMON
60 E. 42nd Street
New York, New York 10017
Tel. (212) 661-0930

October, 1979

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Appendix A

Opinion of the Court of Appeals of the State of New York, May 1, 1979

OPINION

STATE OF NEW YORK

COURT OF APPEALS

No. 150

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent.

No. 151

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent.

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(150) (151) JOSEPH D. BLOCK & PETER GARAM. NY City *for appellant* in (150).

Appendix A

TELFORD TAYLOR, WALTER A. BOSSERT, JR. and DAVISON W. GRANT, NY City, *for appellant* in (151).

HOWARD J. READ and PETER H. SCHIFF, Albany *for respondent* in each matter.

COOKE, Ch. J.:

We determine here whether the Public Service Commission exceeded its statutory authority or impinged upon First Amendment rights by restricting certain advertising and promotional practices of public utilities. For the reasons outlined, we hold that the Public Service Commission was within its authority in imposing the restrictions, and that petitioners' expressional rights were not unconstitutionally impaired.

I

Respondent, New York Public Service Commission, exercises regulatory and supervisory powers over public utilities licensed to operate in the State (see Public Service Law, §§ 5, 66). In 1973 the Commission, reacting to the Arab oil embargo, prohibited electric corporations "from promoting the use of electricity through the use of advertising, subsidy payments * * * or employee incentives". Although the immediate crisis created by the embargo dissipated, no repeal of the promotional ban was effected by the Commission. Then, in July of 1976, the Commission issued a "Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices". Petitioners, Central Hudson Gas & Electric Corporation and Consolidated Edison Company of New York, Inc., as well as other interested parties, responded to the notice, arguing for relaxation of the promotional ban on both policy and constitutional grounds.

After reviewing the comments received and conducting its evaluation of the problem, the Commission rendered a decision on February 25, 1977 entitled "Statement of Policy on Advertising and Promotional Practices of Public Utilities". In its statement, the Commission concluded "that the existing ban on promotion of electricity sales should be continued". Its reasoning

for continuation of the prohibition was succinctly stated: "[C]onservation of energy resources remains our highest priority * * *. It is reasonable to believe that a continued proscription of promotion of electric sales will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales."

That same day, the Commission released an order addressing the topic of utility bill inserts. By that order, the Commission directed all utilities subject to its jurisdiction to "discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy". This restriction, too, was partially explained in the Commission's policy statement: "We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues * * * is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the utilitys message."

Dissatisfied with the decision, Central Hudson and Con Edison petitioned for a rehearing, which was denied by the Commission on July 14, 1977. Central Hudson then commenced an article 78 proceeding challenging the advertising and insert bans. Con Edison instituted a separate proceeding in which it objected to only the billing insert measure. Special Term, in brief opinions, ruled that while the Commission had power to impose the promotional advertising restriction, it lacked authority to prohobit the use of bill inserts. On appeal, the Appellate Division modified, sustaining both branches of the Commission's determination.

II

At the outset, petitioners challenge the Commission's statutory authority to regulate the content of billing envelopes and the promotional advertising practices of public utilities. It is, of course, a fundamental postulate of administrative law that the Public Service Commission, like other agencies, is possessed of only those powers expressly delegated by the Legislature, together

with those powers required by necessary implication (see, e.g., *Suffolk County Builders Association, Inc. et al* v. *County of Suffolk, et al,* NY2d [decided 4/5/79]; *Matter of National Merchandising Corp.* v *Public Serv. Comm.*, 5 NY2d 485, 489; cf. *Matter of Bates* v *Toia,* 45 NY2d 460, 464). Nevertheless, the absence of explicit statutory authorization need not be fatal to a given assertion of regulatory power by the Commission. For, as we have recognized previously, the Legislature on occasion broadly declares its will, specifying only the goals to be achieved and policies to be promoted, while leaving the implementation of a program to be worked out by an administrative body (see, e.g., *Matter of Sullivan County Harness Racing Assn.* v. *Glasser,* 30 NY2d 269, 276; cf. *Matter of Bates* v. *Toia, supra*). In such cases, the sheer breadth of delegated authority precludes a precise demarcation of the line beyond which the agency may not tread. What is called for, rather, is a realistic appraisal of the particular situation to determine whether the administrative action reasonably promotes or transgresses the pronounced legislative judgment (cf. *Matter of Broidrick* v *Lindsay,* 39 NY2d 641, 646).

In the context of this case, without doubt, the Legislature has conferred vast power upon the Public Service Commission (see, e.g., Public Service Law, §§ 4, 5, 65, 66; cf. *Matter of Public Serv. Comm. of State of N. Y.* v *Jamaica Water Supply Co.*, 42 NY2d 880, affg 54 AD2d 10). Indeed, the Commission is expressly endowed with "all powers necessary or proper to enable it to carry out the purposes of" the Public Service Law (Public Service Law, §4, subd. 1). Added to this is the Commission's specific power of "general supervision of all gas corporations and electric corporations" and "all gas plants and electric plants" (Public Service Law, §66, subd. 1).

In light of current exigencies, one of the policies of any public service legislation must be the conservation of our vital and irreplaceable resources. The Legislature has but recently imposed upon the Commission a duty "to encourage all persons and corporations * * * to formulate and carry out long-range programs * * * [for] the preservation of environmental values

and the conservation of natural resources" (Public Service Law, §5, subd. 2). Implicit in this amendment is a legislative recognition of the serious situation which confronts our State and nation. More important, conservation of resources has become an avowed legislative policy embodied in the Commission's enabling act (see, also, *Matter of New York State Council of Retail Merchants* v *Public Serv. Comm. of State of N. Y.*, 45 NY2d 661, 673-674).

It necessarily follows, therefore, that the Commission possesses ample power to prescribe reasonable measures designed to prevent wasteful consumption or unneeded expansion of utility services. By prohibiting promotional advertising of electric power, the Commission has taken precisely such a step. In its expertise, the Commission could have reasonably concluded that promotional advertising might tend to increase injudicious and unnecessary consumption of electrical power. Given this, the authority for the advertising ban becomes apparent.

Nor did the Commission exceed its jurisdiction by prohibiting the inclusion of inserts in utility billing envelopes. The Legislature has granted the Commission express authority "to fix and alter the format and informational requirements of bills utilized by public and private gas corporations, electric corporations and gas and electric corporations in levying charges for service, to assure simplicity and clarity * * *" (Public Service Law § 66, subd. 12-a).[1] Incident to that authority and in the same subdi-

[1] Added by Laws of 1977, chapter 527, approved Aug. 1, 1977. In a case such as this one, in which the effectiveness of the Public Service Commission's prohibitions has been judicially stayed by interim orders during the course of this litigation such that they have not yet attained practical vitality, we have no difficulty in applying to this appeal the principle that we must decide the case on the basis of the law as it exists today. (*Strauss* v *University of the State of New York*, 2 NY2d 464, 465.) It would be but a futile exercise to annul the PSC determination on the basis of prior law only to have the agency validly repromulgate its order under the recent amendment.

vision it is provided that the "commission shall further ensure periodic explanation of applicable rates and rate schedules for the purpose of assisting customers in making the most efficient use of energy". Thus, the Legislature has authorized the Commission to regulate not only the format and informational content of the bill itself but the entire billing communication. Petitioners invite us to read these provisions narrowly, restricting the Commission's jurisdiction to the actual billing instrument itself rather than extending it to the entire contents of the billing envelope. This artificial distinction must be rejected. By necessary implication, the statute, if it is to amount to more than an empty adage, must provide the Commission with authority to oversee the distribution of bill inserts. Were the agency's power construed to extend only to the bill itself, control over informational content and format "to assure simplicity and clarity" could be severely hampered if not totally undermined. While the bill might be simple and clear, utilities could literally inundate consumers with a morass of irrelevant and conflicting data, forms, and pamphlets, causing confusion and oversight. Indeed, granting the utilities unfettered discretion to include all materials would negate the legislative goals of simplicity and clarity. It is difficult to conceive a legislative intent to permit such a disordered pattern. A more acceptable alternative is an interpretation of the statute empowering the Commission to regulate the billing process as a whole.

This construction becomes all the more reasonable when viewed in the context of the entire regulatory scheme. Rather than restricting the PSC's authority, the Legislature has invested that agency with all powers needed to carry out the purposes of the Public Service Law, as well as power to supervise generally the operation of electric and gas corporations and electric and gas plants (Public Service Law, §4, subd 1; §66, subd 1). In view of the expansive definitions of electric and gas plants (Public Service Law, §2, subds 10, 12), the Commission's supervisory authority must be taken to extent to those "useful and necessary services [and property] which facilitate" or are used in connection

with the "manufacture, conveying, transportation, distribution, sale, or furnishing" of utility power (*Matter of National Merchandising Corp.* v *Public Serv. Comm.*, 5 NY2d 485, 490-491; Public Service Law, §2, subds 10, 12). Control of the billing procedure, a process necessarily adjunct to the furnishing of utility service, thus fits neatly into the PSC's supervisory role. This supervisory power, combined with the more specific billing regulatory authority, provides ample justification for Commission oversight of billing envelope content.

To summarize, the Public Service Commission is possessed of sufficient statutory power to prohibit the promotional advertising of electricity and to prescribe the content of electric and gas corporation consumer billing envelopes.

III

The Commissions actions being within the limits of its delegated authority, petitioner's First Amendment contentions must be addressed. The constitutional attack is directed at both the outright prohibition of promotional advertising and the ban on bill enclosures dealing with controversial topics.

Analysis in the First Amendment area proceeds on one of two tiers, depending upon the nature of the restriction which government has imposed (see, e.g., Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv L Rev 1482). At one level, government regulation designed to suppress traditional communicative activity because of its content or potential impact is subject to the most rigorous scrutiny. Absent some compelling justification, such as a likelihood that speech will incite "imminent lawless action", content-oriented restrictions may not stand (*Brandenburg* v *Ohio*, 395 US 444, 447; see *Hess* v *Indiana*, 414 US 105; *United States* v *O'Brien*, 391 US 367, 376-377; see, generally, Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan L Rev 719). On the second tier are those governmental

measures which, although not directly aimed at all communication, inhibit the free flow of information or ideas. The validity of such a restraint is gauged by balancing the various competing interests, with due regard for the status of First Amendment rights in our constitutional scheme. Thus, so long as a facially neutral regulation does not unduly constrict the exercise of protected rights, it is not unconstitutional (compare *Buckley* v *Valeo*, 424 US 1, 60-84, with *Schneider* v *State*, 308 US 147; see, generally, Note, Less Drastic Means and the First Amendment, 78 Yale L J 464).

A

In the present case, the prohibition on billing inserts, which was designed to vindicate the privacy rights of utility customers, constitutes at best an indirect restraint upon expressional activity. It extends not to all speech of a prescribed content, but only to one manner of communication. No one viewpoint is singled out for special treatment, nor is the general right to express ideas in other forums effected. In short, the PSC is concerned with but one particular means of expression, and then only to a limited extent.

It is well settled that government may impose reasonable restrictions upon the time, place and manner of communication (see, e.g., *Grayned* v *City of Rockford*, 408 US 104, 115-117; *Kovacs* v *Cooper*, 336 US 77; *Cox* v *New Hampshire*, 312 US 569, 575). To constitute a valid time, place and manner restriction, a regulation must be content neutral, supported by a significant govenmental interest, and not foreclose alternative channels of expression (e.g., *Va. Pharmacy Bd.* v *Va. Consumer Council*, 425 US 748, 771). Respondent PSC urges that its billing insert decree satisfies these criteria. It is correct.

There is no doubt but that the regulation leaves open numerous alternative means of communication. On its face, the ban only reaches expressional activity conducted through the billing envelope. Whatever other modes of speech were open

to utilities prior to the effective date of the Commission order remain available. That the cost of utilizing these alternative channels may be higher is not determinative, especially where, as here, petitioner has wholly failed to demonstrate that it will be effectively precluded from exercising its rights (see, e.g., *Kovacs* v *Cooper*, 336 US 77, 88-89).

In a similar vein, the ban unquestionably fosters an important governmental interest. Consumers of utility services, like many others in captive situations, have no choice concerning receipt of a periodic statement from the power company. Whatever materials are enclosed in the envelope are destined to come in contact with the addressee. When the insert espouses the utility's viewpoint on a controversial question, it is as likely to offend the sensibilities of the recipient as it is to elicit agreement. Government need not stand idly by and deny assistance to those who are inflamed by having a particular opinion foisted upon them. "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word * * * a different or more preferred status because [it is] sent by mail. The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another" (*Rowan* v *Post Office Dept.*, 397 US 728, 737; see, also, *Martin* v *Struthers*, 319 US 141; Black, He Cannot Choose But Hear: The Plight of the Captive Auditor, 53 Colum L Rev 960). A governmental agency such as the PSC may take appropriate steps to protect this privacy right of its constituents (*Kovacs* v *Cooper*, *supra* at pp 86-89; *Cohen* v *California*, 403 US 15, 21-22; see, also, *Public Utilities Comm'n.* v *Pollak*, 343 US 451, 466-469 [Douglas, J. dissenting]).

Finally, the regulation, properly viewed, is not content oriented. True, the directive sweeps within its strictures only those bill inserts treating controversial topics. But it does not discriminate against persons of any particular political stripe or prohibit

the expression of any one position on a hotly debated issue. In short, the restriction endeavors, in an objective and evenhanded manner, to limit billing insert materials to the innocuous and noncontroversial. Given these circumstances, where the communication intrudes upon the privacy of the home, such a limitation does not offend the First Amendment (*Erznoznik* v *City of Jacksonville*, 422 US 205, 209; see *Greer* v. *Spock*, 424 US 828, 838-839; *Lehman* v *City of Shaker Heights*, 418 US 298, 302-304; see, Tribe, American Constitutional Law, § 12-21, at pp 690-691, & n 21).

Accordingly, because it satisfies the above criteria, the PSC order banning bill inserts constitutes a valid time, place and manner regulation.

B

To be contrasted is the Commission directive proscribing all promotional advertising of electric service. Rather than an oblique inhibition, this order works a direct curtailment of expressional activity: an entire category of speech is prohibited because of its potential impact upon the society. As noted, content-oriented regulations have been subjected to an exacting standard of review, the precise level of that standard being determined by reference to the nature of the communication.

Until recently, communication in the commercial sphere would not have been accorded any First Amendment recognition (compare *Valentine* v *Chrestensen*, 316 US 52, with *Bigelow* v *Virginia*, 421 US 809). While now entitled to a measure of constitutional protection, the full panoply of safeguards afforded more traditional communications does not necessarily attach (*Ohralik* v *Ohio State Bar Assn.*, 436 US 447, 456). Our task, therefore, is to apply the emerging principles of the commercial speech doctrine to the present context.

A common theme sounding in commercial speech cases is the notion that society, as a whole, "may have a strong interest in the free flow of commercial information" (*Va. Pharmacy Bd.*

v *Va. Consumer Council*, 425 US 748; 764, 765; see, e.g., *Linmark Associates, Inc.* v *Willingboro*, 431 US 85, 92; *Bates* v *State Bar of Arizona*, 433 US 350, 364-365). In a market system such as ours, allocation of resources is largely accomplished through a confluence of private economic decisions. Society possesses a vital interest in ensuring that these economic decisions are consummated in an intelligent, well informed atmosphere, and the free flow of commercial information is indispensable to the attainment of this goal (e.g., *Va. Pharmacy Bd.* v *Va. Consumer Council, supra*, at p 765).

The individual consumer, too, has a stake in the availability of commercial information. To many, knowledge of the price and availability of goods and services takes on an importance overshadowing even the most urgent political debate. Especially in these days of rapidly fluctuating prices, the free flow of commercial information plays a central role in consumer decision making. Indeed, it could mean the difference between enjoyment or nonenjoyment of basic necessities (see, *Va. Pharmacy Bd.* v *Va. Consumer Council, supra*, at p 764).

Recognition of these interests accounts, in large measure, for the protections extended commercial speech. In a competitive market, information concerning the availability and price of goods and services is essential to consumers. Analysis of precedent bears out this observation. In *Va. Pharmacy Bd.* v *Va. Consumer Council* (425 US 748, *supra*), for example, the State sought to prohibit advertising of prescription drug prices. Acknowledging the State's strong interest in ensuring the professionalism of pharmacists, the Supreme Court nonetheless found the societal and individual benefits flowing from price advertising in this competitive industry to be superordinate: "Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. * * * But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering" (Id., at p 770). Similarly, in *Bates* v. *State Bar*

of Arizona (433 US 350, *supra*), a disciplinary rule restricting advertising by attorneys was invalidated. In so doing, the court again highlighted the role of commercial information in a free enterprise economy, commenting that "such speech serves individual and societal interests in assuring informed and reliable decisionmaking" (Id., at p 364). The various justifications offered in support of a ban on attorney advertising were deemed insufficient to override these interests (Id., at pp 366-379).

By the same token, where the importance of the free flow of commercial information is diminished, either because of market structure of the industry or hazards associated with a particular means of communication, First Amendment protection reaches its nadir.[2] This dichotomy is aptly illustrated by *Ohralik* v. *Ohio State Bar Assn.* (436 US 447, *supra*), where a prohibition of in-person solicitation by attorneys was upheld. *Ohralik* recognizes the " 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." For this reason, commercial speech occupies a "subordinate position in the scale of First Amendment values" (Id., at p 455-456). Thus, a particular mode of advertising which would not well serve the societal interest in informed decisionmaking, such as in-person solicitation, may constitutionally be banned: "In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the 'availability, nature, and prices' of legal services * * * it actually may disserve the individual and societal interest * * * in facilitating 'informed and reliable decision-

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[2] We are not suggesting that the fate of a business entity's First Amendment rights turns upon its economic self interest (see *First National Bank of Boston* v. *Bellotti*, 435 US 765). To the contrary, petitioners' economic interest would be well served by promotional advertising. Rather, it is the beneficial or detrimental impact of commercial information upon society which assumes importance on analysis.

making' " (Id., at pp 457-458). Such speech, *Ohralik*, teaches, may be prohibited in the public interest.

Applying these principles, the ban on promotional advertising of electricity is consistent with First Amendment strictures. Public utilities, from the earliest days in this State, have been regulated and franchised to serve the commonweal. Our policy is "to withdraw the unrestricted right of competition between corporations occupying * * * the public streets * * * and supplying the public with their products or utilities which are well nigh necessities" (*People ex rel. New York Edison Co.* v *Willcox*, 207 NY 86, 99; *Matter of New York Electric Lines Co.*, 201 NY 321). The realities of the situation all but dictate that a utility be granted monopoly status (see *People ex rel. New York Electric Lines Co.* v *Squire*, 107 NY 593, 603-605). To protect against abuse of this superior economic position, extensive governmental regulation has been deemed a necessary coordinate (see *People ex rel. New York Edison Co.* v *Willcox, supra*, at pp 93-94).

In view of the noncompetitive market in which electric corporations operate, it is difficult to discern how the promotional advertising of electricity might contribute to society's interest in "informed and reliable" economic decisionmaking. Consumers have no choice regarding the source of their electric power; the price of electricity simply may not be reduced by competitive shopping. At best consumers may seek, through the Public Service Commission, to limit future increases in electrical prices. Surely promotional advertising would provide no information of assistance in this respect.

Indeed, promotional advertising is not at all concerned with furnishing information as to the "availability, nature, and prices" of electrical service. It seeks, instead, to encourage the increased consumption of electricity, whether during peak hours or off-peak hours. Thus, not only does such communication lack any beneficial informative content, but it may be affirmatively detrimental to the society. It would not strain the bounds of judicial notice for us to take cognizance of the present energy

crisis. Conserving diminishing resources is a matter of vital state concern and increased use of electrical energy is inimical to our interests. Promotional advertising, if permitted, would only serve to exacerbate the crisis. In short, this constitutes a compelling justification for the ban.

Accordingly, the order of the Appellate Division in each case should be affirmed, with costs.

* * *

In each case:

Order affirmed, with costs. Opinion by Cooke, Ch.J. Concur: Jasen, Gabrielli, Jones, Wachtler and Fuchsberg, JJ.

Decided May 1, 1979

Appendix B

Opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, July 27, 1978

STATE OF NEW YORK
SUPREME COURT

APPELLATE DIVISION—THIRD DEPARTMENT

No. 33186
In the Matter of

CONSOLIDATED EDISON CO. OF NEW YORK,
Respondent,

against

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellant.

CONSOLIDATED EDISON CO. OF NEW YORK,
Respondent,

against

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellant.

No. 33185
In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORP.,
Respondent-Appellant,

against

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellant-Respondent.

Appendix B

APPEAL from a judgment of the Supreme Court at Special Term (Roger J. Miner, J.) entered March 6, 1978 in Albany County, which granted petitioner's application, in a proceeding pursuant to CPLR article 78, to vacate an order of the Public Service Commission and declared that the order was unconstitutional.

CROSS APPEALS from a judgment of the Supreme Court at Special Term (Roger J. Miner, J.), entered March 14, 1978 in Albany County, which granted in part and dismissed in part petitioners application, in a proceeding pursuant to CPLR article 78, to vacate an order of the Public Service Commission.

* * *

PETER H. SCHIFF (Howard J. Read of counsel), for Public Service Commission, appellant, appellant-respondent, Empire State Plaza, Albany, New York 12223.

JOSEPH D. BLOCK, for Consolidated Edison Co. of New York, Inc., respondent, 4 Irving Place, New York, New York 10003.

GOULD & WILKIE (Davison W. Grant of counsel), for Central Hudson Gas & Electric Corporation, respondent-appellant, One Wall Street, New York, New York 10005.

LE BOEUF, LAMB, LEIBY & MACRAE (Ronald D. Jones, Andrew Gansberg and Howard S. Ockman of counsel), for National Fuel Gas Distribution Corp. and others, *amici curiae*, 140 Broadway, New York, New York 10005.

HARVEY J. SHULMAN, for Scientists' Institute for Public Information and others, *amicus curiae*, 1609 Connecticut Avenue, N.W., Washington, D. C. 20009.

* * *

GREENBLOTT, J.

We are here concerned with two separate appeals but because of the similarity of issues we are considering them together.

Appendix B

The first appeal concerns an order of the Public Service Commission (PSC) issued on February 25, 1977 which provided, in pertinent part, that "[a]ll utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy". Petitioner, Consolidated Edison Company of New York, Inc. (Con Edison), challenged the validity of that portion of the order and Special Term annulled the order to the extent that it prohibited Con Edison from utilizing bill inserts as a means of disseminating its views on controversial matters of public policy. Special Term concluded that there was no basis in the statutory powers accorded the PSC which would authorize the total ban of such inserts. We disagree.

The PSC has general powers of supervision and regulation over activities of gas and electric utilities. (See, e.g., Public Service Law, §66.) The issue before us is whether, given these powers, the PSC may prevent management from expressing its political positions in a manner that is inevitably subsidized by the consumer, particularly when the PSC places no restrictions on advertisement by any other means. We hold that it may.

Con Edison does not dispute that the PSC has a duty to allocate costs for political advertising to accounts chargeable to shareholders (16 NYCRR chap. III, subchap. F, account 426.4). An obvious corollary of this duty is the requirement that consumers not be charged with the costs of these political activities. The PSC necessarily has the duty to protect consumers from such charges.

The PSC protests that, given the manner of airing its views chosen by Con Edison, it cannot fulfill that duty. We agree that it would be impossible to separate out the costs attributable to mailing the bills (a customer expense) from the costs attributable to mailing out management statements (a shareholder expense). Unless the PSC allocates all the costs of mailing as well as costs of stuffing the envelopes to the utility, management will benefit from a savings in postage and labor, a subsidy the PSC is empowered to prevent. That the mailings would not cost the consumers anything is irrelevant since the issue is whether

management's costs will be reduced through customer subsidy. In the battle of ideas, the utilities are not entitled to require the consumers to help defray their expenses.

We also reject the argument that the order is a violation of the utilities' free speech rights. Since the PSC's authority to issue the order and the necessity for doing so have been established, it is only a serious infringement of petitioner's constitutional rights that would warrant our annulment of the order. Here, there is no order barring Con Edison from expressing its opinions, nor is there an order barring the company from using the usual forms of advertisement. There is merely an order prohibiting the use of bill inserts to put forth management positions. This insignificant impingement on petitioner's rights is far outweighed by the PSC's duty to prevent customer subsidy of management's pamphleteering.

Nor do we view the order as being fatally vague. The order restricts only the utility's use of the bill insert to express its "position on controversial matters of public policy". The boundaries of the order need not be defined with utmost exactitude. We have little doubt that the PSC and the utilities are capable of distinguishing useful information for consumers (e.g., ways to conserve energy) from management's statements on the political issues of the day (e.g., benefits of nuclear energy). Further, the order clearly contemplates expenditures that would qualify under account 426.4 of the PSC's accounting guidelines (16 NYCRR, chap. III, subchap. F) as expenditures to influence public opinion. This is as detailed a statement of the contours of the order as the Constitution requires. Thus, the judgment entered March 6, 1978 must be reversed.

In the second appeal petitioner Central Hudson Gas & Electric Corp. (Central Hudson) cross appeals from a judgment of Special Term insofar as the court dismissed its application to vacate that part of the order of the PSC issued on February 25, 1977 which classified expenses for advertising designed to sway public opinion as nonoperational and, therefore, chargeable to shareholders and which prohibited promotional advertising by electric utilities. For the reasons hereinbefore mentioned so much of the judgment as annulled that portion of the PSC order banning

the use of bill inserts as a means of disseminating the utility's position on controversial matters of public policy should be reversed.

Concerning the prohibition of promotional advertising Central Hudson initially argues that no statutory authority empowers the PSC to order such a prohibition. The PSC relies on its statutory obligation to assure that rates charged are just and reasonable (Public Service Law, §66) and upon section 5 (subd. 2) of the Public Service Law which requires the PSC to encourage corporations subject to its jurisdiction "to formulate and carry out long-range programs individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources". In justification, the PSC concluded that promotional advertising will increase the use of electricity causing spiraling price increases due to the fact that present rates do not cover the marginal cost of new capacity; that such advertising provides misleading signals that energy conservation is unnecessary; and that additional usage will increase the level of dependence on foreign sources of fuel oil. Considering the impact of promotional advertisement, the PSC is, in our view, statutorily empowered to prohibit such advertisement (Public Service Law, §66; §5, subd. 2).

Central Hudson also argues that the prohibition violates its right to free speech as guaranteed by the First Amendment to the United States Constitution. The Supreme Court has held that commercial speech falls within the protection of the First Amendment (*Virginia Pharmacy Bd.* v *Virginia Consumer Council,* 425 US 748). More recently, in a case where a prohibition was directed at speech itself, the Supreme Court held that the prohibition must be supported by a showing of a subordinating interest which is compelling and the burden is on the government to show such an interest (*First National Bank of Boston* v *Bellotti,* US ——, 98 S Ct 1407). Upon our review of the record, it is the opinion of this court that the PSC has sufficiently demonstrated such an interest and, therefore, the prohibition of promotional advertising is not violative of Central Hudson's First Amendment right to freedom of speech.

Appendix B

Expenditures for political and related advertising activities have normally been excluded from operational expenses in the ratemaking process and consequently have been chargeable to shareholders rather than ratepayers (16 NYCRR chap. III, subchap. F, account 426.4). Central Hudson, however, argues against the expansion by the PSC of the definition of political and related advertising activities to include "all advertising which seeks to sway opinion—legislative, environmental, governmental, consumer or any other kind—to the industry's position on public policy disputes". Specifically included in this category by the PSC were expenses incurred in advertisements designed to influence public opinion concerning the development of nuclear energy. We agree with Special Term that the PSC may properly classify such expenditures pursuant to its rate regulating activities and that the expanded definition propounded by the PSC is not overly broad, arbitrary or capricious (see *Southwestern Elec. Co.* v *Federal Power Comm.*, 304 F2d 29, cert. den. *sub nom Alabama Power Co.* v *Federal Power Comm.*, 371 US 924). We also find no constitutional infirmity in such categorization.

The judgment entered March 6, 1978 should be reversed, on the law, without costs, and the order declared constitutional.

The judgment entered March 14, 1978 should be modified, on the law, by deleting so much thereof as annulled the PSC's directive; determination confirmed, and, as so modified, affirmed, without costs.

SWEENEY, J. (concurring in part and dissenting in part).

We respectfully dissent from that part of the majority's decision that holds that the Public Service Commission (PSC) is authorized to restrict political inserts in billing envelopes.

The PSC has only those powers conferred upon it by the Legislature and such additional powers as are incidental thereto or necessarily implied therefrom (*Matter of New York Tel. Co. v Public Serv. Comm. of State of N.Y.*, 59 AD2d 17). Two provisions of the Public Service Law are proposed by the PSC as authority in support of the ban in question. Initially, it is urged that section 65 (subd. 3) of the Public Service Law is violated

by the use of bill inserts in that it gives the managements of the utilities a benefit or advantage unavailable to others. It is clear, however, that section 65 (subd. 3) relates to the prohibition of discrimination in the provision of services and no such discrimination is present in the instant case.

It is also argued by the PSC that section 66 (subd. 2) of the Public Service Law authorizes the ban on bill inserts as that section empowers the PSC to "order such reasonable improvements as will best promote the public interest". In support of this argument, it is contended that the order in question is designed to protect utility subscribers generally from the conversion of the billing process into a subsidized forum for the dissemination of management's political views. The majority adopts the position of the PSC that the bill inserts would be inevitably subsidized by the consumer and consequently finds authority in the PSC to prohibit the use of bill inserts. In our view, however, it would not be impossible for the PSC to perform its duty of allocating the cost of these management statements to accounts chargeable to shareholders. We find nothing to prohibit the PSC from proportioning the costs so that the cost attributable to the placing of the bill inserts in envelopes and the mailing of the bill inserts would be chargeable to shareholders rather than ratepayers. Such an apportionment would prevent the subsidizing of management's views through the use of bill inserts. Consequently, we find no express or implied statutory power authorizing the PSC to ban the bill inserts prohibited by its order of February 25, 1977. We would, therefore, affirm both of the judgments here on appeal.

MAHONEY, P.J., and MIKOLL, J., concur with GREENBLOTT, J.; SWEENEY and MAIN, JJ., concur in part and dissent in part in a separate opinion by SWEENEY, J.

Judgment entered March 6, 1978 reversed, on the law, without costs, and order declared constitutional.

Judgment entered March 14, 1978 modified, on the law, by deleting so much thereof as annulled the Public Service Commission's directive; determination confirmed, and, as so modified, affirmed, without costs.

Appendix C

Opinion of the New York Supreme Court, Albany County, February 17, 1978

STATE OF NEW YORK

SUPREME COURT: COUNTY OF ALBANY

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION.
Petitioner,

-against-

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK.
Respondent,

for a judgment pursuant to Article 78 of the Civil Practice Law and Rules.

Supreme Court, Albany County Special Term, December 9, 1977
Justice Roger J. Miner, Presiding

Calendar No. 50

APPEARANCES:

GOULD & WILKIE, ESQS.
Attorneys for Central Hudson Gas and Electric Corporation
WALTER A. BOSSERT, JR., ESQ.,
DAVISON W. GRANT, ESQ. and
THOMAS C. HUTTON, ESQ. of Counsel
One Wall Street
New York, New York 10005

PETER H. SCHIFF, ESQ.
Counsel to Public Service Commission
HOWARD J. READ, ESQ. of Counsel
Empire State Plaza
Albany, New York 12223

Appendix C

MINER, J:

On February 25, 1977 the respondent issued its "Statement of Policy on Advertising and Promotional Practices of Public Utilities" and "Order Implementing Certain Restrictions on Utility Advertising." In this proceeding pursuant to CPLR Article 78 petitioner challenges three aspects of the policy statement and implementing order: a) the prohibition upon the use of bill inserts to disseminate the views of utility management on controversial matters of public policy; b) the prohibition upon promotional advertising: c) the respondent's definition of political advertising.

The issues raised by the prohibition upon the use of bill inserts are addressed in a separate opinion issued by this court simultaneously herewith. (*Matter of Consolidated Edison* v *Public Service Commission.*) For the reasons set forth in that opinion, this prohibition is invalid.

Petitioner claims that the ban upon promotional advertising by electric utility companies is a violation of its First Amendment rights under the United States Constitution. Although commercial speech is constitutionally protected, it may be regulated to promote a significant governmental interest. (*Va. Pharmacy Board* v *Va. Consumer Council,* 425 US 748, 48 L. ed. 2d 346: *The Suffolk Outdoor Advertising Co.* v. *Hulse et al,* —— NY2d ——, decided December 21, 1977.) Such an interest exists here. Respondent has determined that the promotion of electricity would increase the costs of providing electric service, causing an adverse impact upon electric rates. Respondent found that even the promotion of off-peak usage would, because of inefficient rate structure, encourage usage not properly priced and economically inefficient. Respondent is charged with the duty of assuring that rates charged are just and reasonable. (Public Service Law, §66; 48 NY Jur., Public Utilities. §61.) The prohibition upon promotional advertising has a rational basis related to respondent's rate regulating responsibilities and advances a significant public interest. (*Linmark Associates, Inc.* v

Willingboro, 431 US 85, 52 L. ed. 2d 155; *Matter of Pell* v *Board of Education*, 34 NY2d 222.)

Expenditures for political and related activities are required to be recorded "below the line" in a non-operating account and therefore are chargeable to shareholders rather than ratepayers. (16 NYCPR Ch. II, Subch. F, Art. 1, Accounts, 426.4.) Respondent may properly classify such expenditures in connection with its rate regulating activities. (*Southwestern Electric Power Co.* v *FPC*, 304 F2d 29, cert. den. 371 US 924.) In its statement of policy respondent has included in its definition of political and related activities ". . . all advertising which seeks to sway opinion—legislative, environmental, governmental, consumer or any other kind—to the industry's position on public policy disputes." (p. 10). Specifically included was advertising designed to influence public opinion respecting the development of nuclear power. The court finds that the definition adopted by respondent is not overly broad, arbitrary or capricious. The positions taken by petitioner to sway public opinion may be advertised and the standard established for determining the allocation of the cost thereof has been clearly established by respondent. Although public utility regulators in other jurisdictions may have determined that expenditures for certain advertising falling within the PSC definition of political activity are properly charged to operational expenses for rate making purposes, the court finds that respondent's determination was not an abuse of discretion here.

Submit judgment consistent herewith.

Dated: February 17, 1978.

All papers to the attorney for respondent.

Appendix D-1

Notice of Proposal to Issue Order Restricting Certain Uses of Electrical Energy, December 5, 1973

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of New York on December 4, 1973

COMMISSIONERS PRESENT:

William K. Jones, Deputy Chairman
Edward P. Larkin, dissenting
Carmel Carrington Marr
Harold A. Jerry, Jr.

CASE 26532—Proceeding on motion of the Commission to conserve fuel used in the production of electric energy.

NOTICE OF PROPOSAL TO ISSUE ORDER

RESTRICTING CERTAIN USES OF ELECTRIC ENERGY
(Issued December 5, 1973)

BY THE COMMISSION:

As has been made clear in recent weeks, the demands for electric energy in this State cannot be met for the foreseeable future without significant reductions in usage in view of the lack of sufficient fuels to generate electricity. The most critical fuel shortage in terms of electric generation exists with respect to residual fuel oil. About 40 percent of the residual oil consumed in New York State is refined from crude oils imported from Arab states in the Middle East and North Africa. Parts of the State are more than 50 percent dependent on Arabian-based residual oil. Much of this supply is no longer available in view of the embargoes imposed by those nations; moreover, for the foreseeable future substitute supplies are not obtainable from other sources. We should make clear, however, that while these embargoes have aggravated the situation, a fuel shortage, particularly of fuels conforming to sulfur requirements under air quality standards for the metropolitan New York City area, was imminent in any event.

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The supply of natural gas has also been deficient for a number of years, and, despite restrictions imposed on its sale, the coming heating season will see even shorter supplies available in New York. In addition, while there is an adequate amount of coal resources in the United States, the current production would not be sufficient to substitute fully for deficiencies expected in other fuels.

As a direct result of these shortages, the interconnected electric utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973-1974 winter. If the State system were forced to operate at normal levels throughout the current heating season, there is a likelihood that service would have to be drastically curtailed at some point, including periods of no service at all to some or many customers, because of an inability to replenish fuel supplies.

In light of this impending emergency, we view it as our obligation under the Public Service Law to take reasonable steps to enable the electric companies to continue providing essential service. At this juncture, increasing capacity is not the answer because of the immediacy of the problem and the shortage of fossil fuels to power new sources of generation. By reducing power demand we can, however, exert the direct control necessary to avert a disaster. In addition, fuel savings can be achieved, although at the expense of overall electric reliability, by requiring utilities to operate at reduced voltages.

While voluntary measures to reduce energy consumption have been undertaken as a result of appeals from the President and other officials, we have concluded that a number of mandatory restrictions on electric consumption should also be imposed as quickly as possible. Such restrictions are essential to husband supplies of fuel so as to permit generation of electricity for the most essential uses.

The Commission has received a large number of recommendations for optimizing the use of available fuel supplies for

necessary power purposes in times of crises. Among these recommendations are prohibitions or restrictions on certain uses which may be considered wasteful or nonessential in the present circumstances. Such uses include outdoor display, private and other decorative lighting and advertising lighting, commercial window display lighting and outdoor decorative fountains, electric ground level snow melting equipment, and heating and lighting in buildings during times when such buildings are not in use.

We consider outdoor display, private and other decorative lighting and advertising lighting to include all outdoor lighting other than highway, street, driveway, walk and parking lot lighting, safety lighting, and illumination of signs needed to identify business establishments during their hours of operation.* Except as needed for identification, the marquees of any place of entertainment shall be considered an advertising sign. Where light from other sources is insufficient to allow the reading of the lettering on the marquee from the nearest street or road, an application for relief may be made to the Commission.

At this time of the year in particular, outdoor display and advertising lighting and decorative fountains can consume large amounts of electric energy, and create the false impression that there is no shortage of the fuels needed to generate electricity. Energy conservation is discouraged by such lighting.

The same is true where commercial office buildings and parking lots are left with lights burning long after offices have ended the day's operations, which includes after-hours cleaning.** The level of light necessary for reading and other work during business hours would be wasteful of substantial amounts of power

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* A sign shall generally be regarded as "needed to identify a place of business" where there is no more than one sign, showing the name of the establishment and type of business only, visible on each building side which contains an entrance for use by the patrons of the establishment.

** The proposed conditions assume that such cleaning would require no more than three hours.

if maintained overnight and would afford no benefit after business hours.

Similarly, heating in commercial buildings need not be maintained after the day's operation at the same temperature maintained during business hours. Space heating thermostat setback to 55°F and the shutdown of air conditioning equipment in unoccupied areas of buildings would conserve a great deal of energy.

Electric snow melting equipment, while providing great convenience, consumes a great deal of energy and is generally not essential. If service is denied for such equipment we foresee no particular hardship ensuing. Should any occur, application for relief may be made to the Commission.

In light of these findings we intend, absent good cause otherwise shown, to direct the electric utilities of this State to file tariff leaves shortly after the date hereinafter specified adopting the substance of the following conditions for the supplying of electric service.

1. No customer shall utilize electric power for outdoor display, private or other decorative or advertising lighting as defined hereinabove or outdoor decorative fountains at any time. In addition, after regular business hours of the customer or establishment maintaining signs, no customer shall use electric power for the purpose of illuminating any sign other than exit signs, and safety or emergency signs.

2. Commercial window display lighting may not be used after 9:30 p.m. or after the close of business, whichever is later.

3. No commercial office building customer shall allow parking lot lighting or interior lights, other than those required for overtime work, safety or security, to remain on more than three hours after the close of business hours of such customers. When working hours differ among offices within a building, electric lights shall be turned off in each office within three hours after the regular closing time of that office, if separate lighting circuits

are available. Lights shall not be turned back on until the start of business hours the next morning in such offices or office buildings.

4. In every commercial building, space heating thermostats shall be set at no more than 55°F, and air conditioning units shall be switched off, during nonbusiness hours except for areas having essential, special requirements or special processes that are in operation. The provision should not be construed to prohibit heating up to 68°F in small areas occupied by watchmen, in areas where after-hours cleaning operations are carried out or to assure such temperature in time for the opening of the business day.

5. Electric ground level snow melting equipment may not receive electric service, except that cases of special hardship may be appealed to the Commission.

6. If a customer shall violate any of the above-mentioned provisions, the electric corporation serving that customer shall, upon five days' written notice, discontinue all electric service to the customer. In the event violations are committed in a building in which more than one tenant, or one or more tenants and the landlord, are served through the same meter, the utility providing service shall not discontinue service without first notifying the Commission.

In addition, the Commission is considering the possible use of voltage reductions, either downstate or statewide, to enhance the conservation of scarce petroleum fuels. Staff estimates that a five percent reduction might produce an energy saving of about two percent of load. The energy saving is not directly proportional to the voltage reduction, since some types of load, such as electric motors, would continue to use about the same amount of energy on a constant basis and in other cases the length of the process, such as cooking, would merely increase with about the same total use of energy.

The use of voltage reduction is not, however, without risk. The ability to reduce load quickly by 5 percent voltage reduc-

tion is an important tool for the system dispatcher when he must meet sudden emergencies involving lack of capacity. To the extent that the tool has already been used, he must turn to other, perhaps more drastic, expedients. Moreover, we are concerned that prolonged voltage reductions may have an adverse effect upon the functioning or durability of motors and certain other types of electrical equipment. To date, most of our experience with voltage reductions has been with limited time periods.

We propose to order a voltage reduction in all areas of the State with these exceptions: (1) Voltage should not be reduced on a specific circuit where to do so would result in an unusable voltage. As to any such circuit, the utility concerned shall promptly file a program for upgrading the circuit. (2) Voltage need not be reduced in an area where voltage reduction would not facilitate oil conservation because of the nature of local electric generation and limitations on transmission line capacity.

We have considered whether the voltage reduction should be employed only over the hours of daily peak load, such as from 2 p.m. to 8 p.m., or continuously over all 24 hours of the day. While the exact difference in savings cannot be predicted, it may be estimated that a four-hour schedule on-peak would save a very substantial portion of the total that could be realized by continuing the voltage reduction for the entire 24 hours. Balancing the fuel savings and the inherent risks of voltage reduction, it is our present intention, absent good cause otherwise shown, to require operation at reduced voltages throughout the State for the periods from 2 p.m. to 8 p.m. As an alternative, for areas with supervisory control of voltage levels, we are considering ordering voltage reductions in three four-hour periods: 8 a.m. to 12 noon; 2 p.m. to 6 p.m.; 8 p.m. to 12 midnight.

Finally, it seems clear that in the present circumstances there is no reasonable basis for any continued promotion of electric usage by any utility subject to our jurisdiction through the use of advertising, subsidy payments not committed prior to the date of this order, or employee incentives.

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The Commission orders:

1. That unless good cause is shown by writing received at the office of this Commission at 44 Holland Avenue, Albany, New York 12208 not later than December 14, 1973, the Commission will direct the electric corporations serving customers in New York State to file tariff leaves containing the hereinabove described restrictions on electric service, and will order a statewide five percent voltage reduction during the period 2 p.m. to 8 p.m. each day until further notice except in the special circumstances discussed above.

2. All electric corporations are hereby prohibited from promoting the use of electricity through the use of advertising, subsidy payments not committed prior to the date of this order, or employee incentives.

3. That each electric corporation shall immediately cause the proposals contained in this order to be published in at least two newspapers of general distribution in each territory served by that corporation.

By the Commission,

(SEAL) (SIGNED) SAMUEL R. MADISON
Secretary

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Statement of Policy on Advertising and Promotional Practices of Public Utilities

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

STATEMENT OF POLICY
ON ADVERTISING AND PROMOTIONAL
PRACTICES OF PUBLIC UTILITIES

Issued: February 25, 1977

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STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

COMMISSIONERS:

Alfred E. Kahn, Chairman, concurring in part and dissenting in part
Edward Berlin, Deputy Chairman
Carmel Carrington Marr
Harold A. Jerry, Jr.
Anne F. Mead, dissenting in part
Charles A. Zielinski

STATEMENT OF POLICY
ON ADVERTISING AND PROMOTIONAL PRACTICES
OF PUBLIC UTILITIES

(Issued February 25, 1977)

BY THE COMMISSION:

On July 28, 1976, we issued a notice of proposed policy statement and requested comments on the subjects of advertising by utilities and the promotion of electricity sales. We indicated our intention to reexamine subjects covered in our 1972 policy statement on these matters[1] in light of contemporary conditions. We asked interested parties to comment on the items discussed in the proposed policy statement and to offer alternative suggestions on these issues if they so desired.

Over 300 responses to our notice were received. Many of these were brief statements of position from individual consumers; others, including those from most of the utilities, consumer, environmental and other special interest groups, were more comprehensive in scope. Because of the great number of responses,

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[1] *Statement of Policy on Advertising and Promotional Practices by Public Utilities,* 12 NY PSC 108-R (issued June 21, 1972).

no attempt will be made in our discussion to identify the particular views of individual respondents. It is worthy of special mention, however, that we found the responses extremely valuable. They were all carefully considered and evaluated in reaching decisions on the issues presented in our notice.

Although the amount of money spent on advertising by major utilities in this State is a very small portion of their total revenues, the proper extent and content of such advertising and the ultimate responsibility for its cost is an increasingly controversial issue. This Commission has routinely monitored the advertising practices of New York utilities within the framework of the Uniform System of Accounts and the guidelines for rate treatment of these expenditures set forth in our 1972 policy statement, as subsequently amended in individual rate proceedings. Thus, we have established a system of regulation which has provided reasonable assurance that even the minor amounts expended are properly accounted for, so that we can determine whether utility rates reflect only reasonable amounts, expended for proper purposes.

Our 1972 policy statement was issued at a time when the telephone industry was beset with significant service problems, since largely overcome, when the emerging gas supply shortage was first recognized and, of perhaps greatest importance, before the 1973 oil embargo which resulted in severe fuel oil shortages and sharply increased oil costs. While we have, through individual rate and other orders, amended the provisions of the 1972 policy statement where necessary to meet these changing conditions, we have during the past year felt it desirable to have a fresh look, in integrated fashion, at the totality of issues associated with utility company advertising and promotional practices, in the light of circumstances of 1976 and 1977.

Advertising expenses may be subdivided into two broad categories: promotional—advertising intended to stimulate the purchase of utility services—and institutional and informational, a broad category inclusive of all advertising not clearly intended to promote sales.

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Promotional Advertising[1]

(1) *Electricity*

The 1972 policy statement contained no restriction on the promotional advertising of electric utilities, explicitly recognizing that those companies had exercised self-restraint in these efforts, most of which were limited to development of off-peak loads. Shortly after the oil embargo, and in response to the reductions in oil supplies, we prohibited the promotion of the use of electricity through advertising or the provision of subsidy and incentive plans. That ban is still in force.

In our July 28, 1976 notice, we requested comments on a proposal to lift the flat ban against sales promotion by electric companies. We listed several competing considerations, some arguing for extension of the ban and others for its relaxation.

Of the responses received on this specific matter, a large number of parties suggested that electric companies be permitted to develop off-peak loads. In addition to the benefits of a limited relaxation that were mentioned in our notice, many of these parties pointed out that development of off-peak load would likely result in a lowering of the unit cost of electricity, due to a greater utilization of existing plant, with a resulting downward pressure on, or at least a stabilization of, present rates. Others observed, as we did in our notice, that where electricity competes with oil, promotion of electricity, if generated incrementally from coal or uranium, could confer the additional benefit of making this country more independent of foreign oil supplies in those cases where oil is the primary competitive fuel.

We recognize now, as the Commission did in 1972, that development of off-peak loads may be beneficial in numerous

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[1] In addition to establishing the policy set forth below, we will require strict adherence to the accounting classifications of this type of advertising as set forth in the Uniform System of Accounts prescribed for electric, gas and telephone utilities. See Resolution of the Commission: Amendment of 16 NYCRR, Chapters II, III and VI, Article 1, adopted October 24, 1973.

ways. Increased off-peak generation, however, while conferring some beneficial side effects, also consumes valuable energy resources and, if it is the result of increased sales, necessarily creates incremental air pollution and thermal discharges to waterways. More important, any increase in off-peak generation from most of the major companies producing electricity in this State would not, at this time, be produced from coal or nuclear resources, but would require the use of oil-fired generating facilities. The increased requirement for fuel oil to serve the incremental off-peak load created by promotional advertising would aggravate the nation's already unacceptably high level of dependence on foreign sources of supply and would, in addition, frustrate rather than encourage conservation efforts. We realize, too, that a continued ban on promotion of off-peak electric usage may aptly be described as piecemeal conservationism since promotion of oil for use in heating or internal combustion applications is not similarly proscribed. Nevertheless, conservation of energy resources remains our highest priority. We do not consider it inconsistent with that principle to implement programs that admittedly will be less than optimally effective, in a national context. It is reasonable to believe that a continued proscription of promotion of electric sales will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales.

We conclude that the existing ban on promotion of electricity sales should be continued. We recognize, however, that as we move toward more and more widespread adoption of time-of-day rates, it may be highly desirable for companies to publicize those rates, and point out the various ways in which customers may take advantage of them. While this advertising may better be described as informational, we wish to make clear, in any case, that it is our desire to permit advertising of this kind, provided it has the exclusive, or at least preponderant effect of encouraging *shifts* of consumption from peak to off-peak and little or no effect of increasing aggregate sales. For

these reasons, we will remain prepared to approve specific proposals by the companies for specifically described programs that meet these criteria. We shall reexamine from time to time our determination to continue, with the limited exception for publicizing time-of-day rates, the ban on promotional advertising should conditions change sufficiently to warrant such a reevaluation. Further, we shall continue to maintain surveillance of all advertising activities engaged in by electric utilities, and where deviations from the requirements of our order are found, we will take remedial action, including adjustments in rate cases, to bring about compliance.

(2) *Gas*

Because of the then emerging and increasingly severe shortage of natural gas, on October 26, 1971,[1] we ordered all gas companies (with the exception of several small companies specially situated) to limit the attachment of new gas customers and the expansion of gas service to existing customers.[2] That order also provided:

> Effective January 1, 1972, all gas distributors subject to the restrictions imposed herein shall cease all promotional activities designed to acquire new gas customers or increase sales of gas to existing customers. Except to the extent indicated below, such prohibition shall apply to all advertising employing mass media, all bill inserts or other direct mailings to customers or others, and all calls by salesmen seeking to obtain or arrange "conversions" to gas space heating or to sell or promote the sale of gas appliances. The prohibition does not apply to:
>
> (a) Service calls to repair existing gas equipment, recommendations relating to the replacement of such equipment, and information relating to such replacement.

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[1] Case 25766, the *Gas Restriction Case,* 11 NY PSC 1257.

[2] Case 25766, the *Gas Restriction Case,* 11 NY PSC 1257.

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(b) Advice directed to existing customers as to how they may achieve the best heating and safety results with respect to existing gas equipment. Use of the mass media or unselective mailings are not an acceptable means of accomplishing this objective.

(c) Direct contact with existing or potential customers for the purposes of encouraging the installation of dual-fuel equipment.

(d) Individual responses to inquiries received by a gas company without prior solicitation.

These provisions were incorporated into our 1972 Policy Statement and remain in effect. We have reexamined these requirements in light of current conditions and conclude that, for the most part, they should remain unchanged. We are, however, concerned about the exception granted in item (c) above. Because additional demand for gas can be created as a result of direct contact with potential customers for the purpose of encouraging the installation of dual-fuel equipment we will no longer consider this a permissible activity by gas utilities. Of course, the companies may continue to encourage their existing gas customers to install alternate fuel equipment. In addition, in view of the deepening gas supply shortage, and the essentiality of inducing all customers to conserve, we will no longer permit promotional activities designed to retain existing customers at previous levels of consumption, except in those limited instances where gas companies are permitted to attach new residential load to offset a decline in firm load.

All other provisions of our previous order will remain in effect, as to each gas company covered. Exceptions to this policy may be granted provided a company can clearly demonstrate that it has firm supplies of gas, for the present and near future, sufficient to permit it to engage in some limited form of promotional activity without lessening the supply of gas available to existing customers.

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As long as the shortage of natural gas continues, we shall maintain close surveillance of advertising and other promotional activities of gas companies. We shall also continue to require prior submittal of the promotional plans of gas utilities seeking to deviate in any way from our order in Case 25766 as amended here.

(3) *Telephone Companies*

On February 11, 1970, we directed New York Telephone Company to "cease all promotional advertising and all other promotional activities designed to attract additional subscribers or otherwise to increase telephone usage until such time as the company's capacity to provide service exceeds busy-hour requirements throughout the state, except for local promotions in areas where ample capacity exists." Case 25290, *New York Telephone Company Service Case,* First Interim Order, 10 NY PSC 93. Since adoption of this order, New York Telephone Company's capacity to provide service has improved to the point where it now exceeds busy-hour requirements throughout the state. By order issued in Case 25290 on March 13, 1973, 13 NY PSC 461, we relaxed the promotional advertising restrictions previously imposed "provided that the company will insure that the service sought to be promoted will not burden the subscriber body with an increase in average costs, but rather will tend to reduce the burden of cost which must be supported by the average subscriber."

While the interim order in Case 25290 was outstanding, we considered whether the promotion of yellow pages should also be restricted and we concluded that it should not. Yellow pages promotion may increase telephone usage to some extent, but the major purpose of these directories is to facilitate more efficient use of the telephone by reducing calls to information or to parties unable to assist the caller.

We shall continue the policy on telephone promotional advertising that is now in effect. Promotional advertising by New York Telephone Company, or by other telephone companies, including

radio-telephone utilities, will be carefully scrutinized to assure (1) that adequate capacity exists to provide the service sought to be promoted without adversely affecting existing subscribers; and (2) that the advertising expenditures themselves together with the expansion of the service which they seek to promote will tend to reduce rates for telephone service.

Institutional Advertising

In addition to seeking to promote sales, utilities (like other businesses) engage in "institutional advertising"—a rather amorphous phrase covering all advertising which is not sales promotional in nature. Although our staff has employed some relatively useful tests in reviewing expenditures for this kind of advertising,[1] the very imprecision of the definition has caused substantial controversy in our proceedings about whether certain kinds should be recovered in rates. Therefore, we believe there is a clear need to reexamine this area, and to establish a policy for treatment of related expenses in rate cases. We consider separately two categories of institutional advertising: (1) civic, political and related advertising activities, and (2) informational and other institutional advertising.

Civic, Political and Related Advertising Activities

It is generally accepted that advertising which states a utility's position on a matter of public controversy necessarily reflects the political views or self-interest of managements or shareholders and should not be borne by ratepayers, whose views or interests may differ. Thus, political advertising—in support of, or opposed to, governmental action of any kind—will not be considered a legitimate cost of doing business for the purpose of determining rates. See *Complaint of Grassroots Action, Incorporated,* Case 26315, April 18, 1973, 13 NY PSC 630. Our amended Uniform System of Accounts reflects this view. All political advertising is required to be recorded below the line in nonoperating expense account No. 426.4. Expenditures recorded in this account are routinely excluded in the ratemaking process.

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[1] *E.g.,* "Is the advertising clearly beneficial to consumers?"

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Our decisions in two recent cases notwithstanding,[1] we shall also include in the category of political and related activities, and therefore payable by stockholders, all advertising which seeks to sway opinion—legislative, environmental, governmental, consumer or any other kind—to the industry's position on public policy disputes. Utilities, of course, have the right to publish their thoughts on vital issues concerning their operations, but, upon consideration of the comments received in response to our notice, we are now persuaded that it is unfair to impose the cost of disseminating those thoughts onto ratepayers who may or may not agree with them. The expression of a utility's views on a controversial issue may truly reflect its concern for the welfare of its consumers and may make a genuine contribution to a public policy debate; but we believe that it is basically unfair to assess against ratepayers the cost of advertisements urging the adoption of positions with which they may disagree. Therefore, we will no longer sanction the use of sums provided by ratepayers to advance one side of a public controversy. We include in this category expenses incurred in the preparation of materials designed to influence public opinion in the current debate concerning the development of nuclear power. We do not seek by this action to inhibit or discourage participation by utilities in public debates of issues that vitally concern them: we recognize and endorse their right to do so. We simply believe that it is wrong to expect ratepayers to finance that participation.

Further, we shall not permit advertising on matters of public controversy to be included in the printed material that often accompanies the mailing of consumer bills. We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues (even when the stockholder pays for it in full) is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it

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[1] Case 26848, *Rochester Gas & Electric Corporation* (Opinion 76-8, issued April 8, 1976) and Case 26887, *Long Island Lighting Company* (Opinion 76-11, issued May 28, 1976).

is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism. A utility company's mailing list provides an available conduit for the easy dissemination of information, which should be used for the benefit of both the consumer and the company to convey noncontroversial and useful information that will create a better informed public. It should not become a vehicle for dissemination only of the company's views on controversial matters of public policy. Accordingly, we will not permit bill inserts to be used by utility companies for the purpose of advertising their opinions or viewpoints on controversial issues of public policy.

Informational and Other Institutional Advertising

Some forms of utility institutional advertising clearly are in the public interest and their costs are a legitimate expense of doing business. These include appeals for the conservation of gas or electricity; notification of emergency conditions and procedures; instructions in the proper use of the equipment which makes use of the utility's service; information about new rates, new billing practices, or new inspection or meter reading schedules; advice concerning hazards associated with the utility's service; reports on matters of interest to the public concerning the utility's service—such as service difficulties and progress in overcoming them, projections of new capacity additions, plans for new or improved means of providing service, and the like. Expenses incurred by utilities for this type of advertising are clearly properly recoverable in rates.[1]

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[1] In addition to purely informational advertising, those advertising costs attributable to a utility's effort to upgrade the residential and industrial potential of its franchised territory and to improve the area's overall economic condition are properly recoverable. Advertisements extolling the desirability of the area as a location for job-creating industry would, if successful, benefit all of the utility's customers. Whatever its possible effects on utility rates, its benefits for the economy of New York State clearly makes such advertising a fully acceptable activity by utility companies.

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There is, in addition to purely informational, a large middle ground of institutional advertising that falls somewhere between that clearly beneficial to customers, and that which is clearly political or controversial. There is advertising, for example, in which a company defends, justifies, or even merely explains and describes its activities. It might be argued, on the one hand, that there is no reason for ratepayers to bear the costs of such self-justification; that it is not of direct usefulness to them. On the other hand, it is extremely difficult to argue, especially now when public utilities are subjected to frequent public attack and criticism, that these are not, within limits, legitimate and indeed inescapable costs of doing business in today's conditions. It is unreasonable not to afford utility managements under attack an opportunity to explain and justify themselves. It might be argued, of course, that since such expenditures are on behalf of the companies rather than in the direct service of their ratepayers, they ought to be paid for by the shareholders. But if they *are* inescapable costs of doing business, and if, as is our policy, we allow shareholders returns only at the minimum level necessary to attract capital, then at least in principle if we were nominally to disallow these expenditures from rates, we would have to provide a correspondingly larger return on equity.

Our experience demonstrates that the time spent by our staff in ferreting through innumerable vouchers of institutional advertising is far out of proportion to the dollar amount of expenses found in that process to be unacceptable for rate purposes. For example, in the year 1975, *all* advertising costs spent by the seven largest privately owned electric, gas and steam utilities in New York State amounted to $3,370,000. Since the utilities received $5,280,264,000 in revenues for that year, the advertising costs equated to 6/100 of 1% of those revenues: six cents on *all* forms of advertising for every $100 in revenues received. It follows that since institutional advertising of a questionable nature is only a part—and typically a very small part—of total advertising, its impact on rates would be very slight indeed. It is obvious that any benefits gained from close, individual examina-

tion of these insignificant costs must be outweighed by the costs of their examination.

It is for these reasons that we have decided to allow companies a very small pool of dollars in rates to cover both informational and the intermediate category of "other institutional" advertising. On the basis of past practice, this allowance will, in all probability, range between 1/10 and 1/25 of one percent of operating revenues, in inverse relationship to the size of the companies. It will be determined individually for each company, in its next or pending rate case,[1] on the basis of various other factors including size, geographical location, number of customers and costs of doing business in the area. Adoption of this modest lump sum advertising allowance approach will end the vexing and essentially arbitrary process our staff now engages in of reviewing all informational and other institutional advertising to decide whether specific expenses should be allowed or disallowed in setting utility rates.

This plan will obviously not solve all the problems we have described: we will still have to determine which advertisements are clearly political and/or self-serving, and specifically disallowed; and parties in rate cases would still be free to question the propriety of the lump sum allowance for the informational and other institutional advertising categories. On the other hand, it has the virtue of recognizing that some modest institutional expenditures, over and above those purely informational in nature, are an inescapable and legitimate cost of doing business, and get the Public Service Commission out of the business of an item-by-item content examination and evaluation of past advertisements—an activity in a sense redundant anyhow, in view of the fact that all we really do is set a reasonable level of rates for the future.

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[1] In pending cases where the hearings have been completed, parties may present their views on a proper lump sum institutional advertising allowance on brief.

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Our staff will maintain close and continuing scrutiny over the level of the lump sum advertising allowance for each company to assure that the amount provided is sufficient to cover only reasonable and necessary advertising costs consistent with this policy statement. We expect to review the policies set forth here periodically and to revise them when it seems desirable to reflect new or changed circumstances.

In the area of developing better public relations and avoiding obvious areas of customer dissatisfaction, utility managements are urged to give serious consideration to the clear labeling of the institutional advertising that will not be recorded as a cost of doing business for rate purposes. It is not in the interest of anyone to have institutional advertising exacerbate customer resentments at a time when large rate increases are made necessary by increases in various classes of costs beyond the control of utility management. Expenditures for institutional advertising *are* subject to management control and utility managements would be well advised, if the advertisement is either political or of a type not providing useful information to customers, to state in the advertisement itself: "The costs of this message are being borne by the company's stockholders and the expense will be excluded from consideration in any proceeding concerned with fixing the company's rates."

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

STATEMENT OF POLICY ON ADVERTISING AND PROMOTIONAL PRACTICES OF PUBLIC UTILITIES

ALFRED E. KAHN, Chairman, concurring in part and dissenting in part:

I am for the most part in agreement with the conclusions we reach in this decision and the supporting argument, having participated actively in their formulation. At the same time, my views about our proper role in regulating the advertising policies of utility companies are sufficiently distinctive from those of my fellow commissioners to make me want to set them forth in my own words and over my own signature.

I begin by saying, in different words, what our opinion says: namely, that the many hours that we, our staff, the regulated companies and various intervenors devote to utility company advertising policies, and to deciding what portion of such expenditures are properly recovered in rates, are by any reasonable test a waste of time and ratepayers' money. These efforts must surely have the lowest benefit/cost ratio of any in which we engage; and the time inescapably devoted to them by our staff and commissioners would almost certainly have a much larger pay-back to ratepayers if it could be devoted to other endeavors—such as the further scrutiny of management efficiency, the formulation of more efficient rate structures, more intensive pressures on the companies we regulate to engage in load management and to encourage conservation. The heated discussions about advertising policy are, in other words, a tempest in a teapot, considering, first, the very, very small number of dollars at stake, and, second, the essential fraudulence of our purporting to exclude from rates expenditures for advertising that company managements will continue to feel it necessary to make: since we make every effort to set the allowable return

on equity at the minimum cost of capital, and most of the companies we regulate are not earning even that, in principle putting any advertising expenditures "below the line" can only mean, if we are honest, increasing the allowed return on equity, in order to enable these companies to raise the capital they need on reasonable terms.

For these reasons, I am particularly enthusiastic about our decision to provide companies with a very, very modest lump-sum allowance for institutional advertising. It is a first step in the direction of sanity, offering the hope of cutting down on the endless hours our staff has to devote to scrutinizing individual advertisements, then deciding and litigating whether they are properly includable in test-year expenses for rate-making purposes.

At the same time, there are many things we do and must do that cannot be said to pay off on a pure dollar and cents basis. If it infuriates some consumers to see some of their dollars—even if for each of them it means only a penny a year—spent to extol the benefits of nuclear power, or to induce them to purchase additional electricity or gas, or to make greater use of the communications facilities provided them by franchised monopolists, we must confront the question of principle, of whether we should be condoning this kind of use of ratepayers' dollars, even if the confrontation costs ratepayers more dollars than the companies spend in these questionable ways.

If it comes to questions of principle, however, there are more principles at stake than the Commission seems willing to recognize in its decision today, and it is these that I take the occasion of this partial concurrence and partial dissent to spell out.

Promotional advertising by electric companies

It is only with the greatest reluctance and distaste that I join my colleagues in continuing our absolute prohibition of promo-

tional expenditures by electric companies. While, as a non-lawyer, it has never been clear to me why the protections of the Fourteenth Amendment, which as a matter of historical fact was enacted to protect the rights of real, biological *people,* should necessarily have been extended to state-created artificial entities like corporations, I also believe in competition as a form of economic organization, wherever it is feasible. And for competition to be effective, some sales promotion is necessary. Even if that were not so as a general matter, it would in my judgment be inescapably so when there compete in the market two rivals, one of whom is free to advertise his wares and the other is—under our present policies—not.

The issue of whether electric companies should be permitted to advertise (observe that the question before us is not whether those expenditures should be recovered in rates, but one, rather, of our totally prohibiting such activities) arises almost exclusively in the context of summer-peaking electric companies wanting to be permitted to promote electric space heating, which is for them essentially an off-peak use of power, with their principal rivals, the distributors of *heating oil,* vociferously importuning the Public Service Commission and the Legislature to prevent them from doing so. An idea is not necessarily a bad one merely because it is propounded by a scoundrel, or—as in this case—a businessman who wants to be relieved of the burdens of competition. But it has always been a source of wonder to me how self-styled protectors of the consumer interest could have so readily allied themselves—to such a point that in some cases the distinction between them disappears entirely—with people who seek the assistance of government in suppressing competition.

There are considerations in this case, however, that induce me to go along with continued prohibition, however queasily.

1. The first is grounded in a combination of facts: first, that for apparently all of the summer-peaking electric companies in the state, marginal generating capacity off-peak as well as on is oil-fired, and promises to continue to be for several years; and

that the use of such capacity to provide electricity for resistance heating, because of the fact that it takes something like three btu's of oil to generate the equivalent of one btu of electric energy, is simply far less efficient in energy terms and uses more oil in total than direct combustion of the oil for space heating purposes. (I must point out, however, that the three for one comparison grossly exaggerates the relative inefficiency of electric resistance heating, because it fails to take into account the energy costs of delivery of oil to the various points of consumption; the far less than 100% efficiency with which oil is typically burned in furnaces; the lesser injury to the environment from combustion of oil in electricity generation than, alternatively, in thousands of separate furnaces; and the promise of the heat pump of sharply increasing the efficiency of the use of electricity for heating. But electric space heating still seems to use more oil, typically; and it is a matter of utmost urgency to reduce the dependence of our economy on imported oil, which must supply the growing difference between what we are capable of producing at home and what we consume.)

On the other hand, I find myself in basic disagreement with the popular simplistic view that electric resistance space heating should simply be banned because it is "less energy efficient." I do not accept an exclusively energy standard of value. There are many pertinent costs and benefits besides the direct use of energy to be taken into account in making intelligent economic choices —the relative costs of labor, of capital installations of heating equipment (which also indirectly use energy), the relative comfort and convenience of alternative methods of satisfying needs, the use of other scarce materials, and the damage to the environment. The only sensible common denominator for these various costs is the dollar: provided there are no major distortions in the price tags placed on these various elements of cost, it is the total dollar costs, not just the btu's that should be compared.

Moreover, I do not believe it is the proper function of a public utility regulator to tell people that they cannot have things for which they are willing to pay the price. It is our responsibility

to see that prices reflect costs—all relevant social costs; it is our responsibility also to persuade and educate consumers to make intelligent choices. But I do not conceive it as our responsibility to tell people that they may not have something for whose total marginal social costs they are willing to pay: regulators are all too prone to substitute their judgments of what is good for people for the judgments of the people themselves.

For these reasons, it is only with the greatest reluctance that I go along with a policy that denies one competitor the right to advertise his wares, while leaving another free to do so, because we do not think customers should be encouraged to use electric resistance heating.

2. I do so, additionally, because the most promising mechanism for offsetting the relative inefficiency of converting fossil fuels into electricity is the heat pump; but installation of a heat pump means also installation of central air conditioning. To this extent, then, the promotion of off-peak electric space heating involves, in effect, the promotion also of on-peak summer air conditioning. Once again, my espousal of free consumer choice as a general principle would require me to regard such a development with equanimity—were it not for the fact that the price of electricity to most consumers in the state does not fully reflect the apparently much higher marginal social costs of on-peak consumption in summer peaking markets. Until each consumer individually confronts a marginal cost-based, time-of-consumption rate, consumption on peak, with its large marginal use of oil-fired generation, is artificially subsidized.

If, then, the uncontrolled promotion of electric heating means the installation of heat pumps, which mean, in turn, more central air conditioning, the use of which is not charged its full marginal costs, the result is inefficient subsidization of consumption on peak, and higher rates for all consumers.

3. There are, of course, some electric companies in the state whose peaks fall in the winter rather than in the summer. It

would seem that these might be permitted to promote, at least where there is a reasonable basis for believing the effect will be to stimulate sales off peak, improve their load factors, and therefore benefit all customers (provided the rates for the promoted service cover long-run incremental costs). But until we have ascertained in our generic electric rate proceeding (C.26806) whether the proper costing entity for marginal cost-based time-of-day rates is the individual company or the state system as a whole, such a relaxation of our ban opens up the possibility that, by permitting upstate, winter-peaking companies to promote summer air conditioning, we may in effect be encouraging a greater expansion of capacity for the State as a whole, which is summer peaking, than would otherwise be desirable. To put it another way, if the proper costing entity is the State rather than the individual company, the marginal costs of summer sales may be much higher than of winter sales even in winter-peaking markets. Until we have resolved these costing questions, there is a danger that permitting individual companies to promote sales off their own individual peaks will in effect involve uneconomic subsidization of those sales.

I do not regard flat prohibitions of promotion by public utility companies abhorrent as a matter of principle. Where a company enjoys something close to monopoly, conferred upon it by public franchise, it does not in my judgment have an unfettered right to advertise. This is particularly so because merely disallowing such expenditures in setting rates, under the glib assumption that these costs will then be borne by stockholders rather than ratepayers, is something of a sham, for reasons I have already set forth.

Nuclear advertising

This last observation applies with particular force to the Commission's decision here to disallow the costs of advertisements publicizing company management views in favor of nuclear power. If electric company executives continue to feel that nuclear energy is in the best interest of their ratepayers, they are

likely to continue to feel a responsibility for publicizing that fact. (And, for reasons we have already set forth in our Rochester Gas & Electric and Long Island Lighting Company decisions on this subject, decisions that the Commission majority reverses today, I would not wish them to refrain.) Since we set our allowance for return on equity at something close to the minimum cost of capital, and most companies in the state are in any event earning something short of that amount, any continuation of such "disallowed" expenditures by utility company managements would in principle require us to raise the return on equity allowance correspondingly. In these circumstances, telling companies to put certain expenditures "below the line" comes out either to telling them to stop making the expenditures entirely, or is essentially cosmetic—and a trifle insincere.

I would have been happy to go along with the resolution of this dilemma proposed by Commissioner Berlin to the RG&E and LILCO cases—namely that utility companies be required to provide equal support for the presentation of opposing viewpoints. A reading of the responses to our call for comments on this subject persuades me, however, that his proposed requirement would expose us to endless litigation; I reluctantly conclude that its administration would be simply impractical.

In these circumstances, my own preference would be to extend the modest lump-sum allowance we have decided to provide for *institutional* advertising to cover discussions of general public policy issues such as the desirability of nuclear power as well. The logic, I suggest, is the same: company managements are likely to feel a continued obligation to present their views on the merits of nuclear energy; they are likely to feel that this is in the interest of their ratepayers, possibly more than their stockholders (who hardly benefit when companies must sell stock below book value in order to finance these extremely costly plants); and I would be inclined to agree.

Following this same reasoning, I repeat my extreme satisfaction at the Commission's resolution of the issue of institutional

advertising. Our decision here is both sensible and non-ideological. We decline to cater to the vulgar view, often demagogically expressed, that public utility companies have no right to communicate with their customers, or to answer the often unjust criticisms to which they are subjected, and that if they wish to do so, the expenditures should be placed "below the line"—an expedient that is in my judgment something of a sham.

Appendix D-2

STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

Re: STATEMENT OF POLICY ON ADVERTISING AND PROMOTIONAL PRACTICES OF PUBLIC UTILITIES

ANNE F. MEAD, Commissioner, dissenting in part:

I concur, with one exception, in the statement of policy issued this day on advertising and promotional practices of public utilities.

The one exception is the area of institutional advertising which is designed to create, enhance or sustain the corporate image of the utility or which indulges in self-congratulation or self-admiration of the utility or its accomplishments. In my opinion these advertisements should not be allowed as an operating expense in any rate schedule proceeding or for rate making purposes.

The institutional advertising which I describe above is not in my opinion a necessary or proper expense in providing utility service. At a time when utility rates are increasing beyond the ability of many to pay, any expense, no matter how small, that is not necessary or beneficial to the consumer should not be allowed for ratemaking purposes.

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Order of the Public Service Commission of the State of New York Denying Petitions for Rehearing, July 14, 1977

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on July 6, 1977

COMMISSIONERS PRESENT:

Edward Berlin, Acting Chairman
Edward P. Larkin
Carmel Carrington Marr
Harold A. Jerry, Jr.
Anne F. Mead
Charles A. Zielinski

Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices.

ORDER DENYING PETITIONS FOR REHEARING

(Issued July 14, 1977)

BY THE COMMISSION:

On February 25, 1977, we issued our Policy Statement on Utility Advertising announcing certain changes in our treatment of this subject. Specifically, we stated: (1) that gas utilities should discontinue direct contact with potential customers for the purpose of encouraging installation of dual-fuel equipment and (2) that all utilities should discontinue the practice of using bill inserts as a mechanism for the dissemination of a utility's position on controversial matters of public policy. By Order issued the same day, these changes were put into effect.

Petitions for rehearing have been received from the Consumer Protection Board (CPB), Central Hudson Gas & Electric Corporation, Columbia Gas of New York, Inc., Consolidated

Edison Company of New York, Inc., Niagara Mohawk Power Corporation, New York Telephone Company, New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation. Replies to exceptions have been filed by the CPB and the Natural Resources Defense Council, Inc., *et al.*

PROMOTIONAL ADVERTISING

Central Hudson excepts to our decision to continue the existing prohibition of promotional advertising by both electric and gas companies. The utility contends that under *Virginia State Board of Pharmacy* v *Virginia Citizens Consumer Council, Inc.*, 425 US 748 (1976), commercial speech is protected by the guarantees of the Bill of Rights and, therefore, our restriction on promotional advertising is void. This case involved a Virginia statute which provided that a pharmacist is guilty of unprofessional conduct if he advertised the price of any prescription drug. There is no contention here that commercial speech falls outside the scope of the First Amendment. But this does not mean that commercial speech may never be regulated.

In *Virginia State Board of Pharmacy,* the Court could find no legitimate State interest in restricting the dissemination of pricing information to the public. A much different situation exists here. The rates of electric utilities in this State continue to rise. The need for such increases derives in substantial part from pressures for increasing plant capacity to meeting growing demand. While some progress is being made to price electricity to meet its marginal cost, it is clear that the rates charged today do not cover the marginal costs of new capacity. In these circumstances, promotion of electric usage by electric utilities will simply exacerbate the pressure for spiraling prices. Moreover, when national policy requires energy conservation, the promotion of electricity by regulated public utilities provides totally misleading signals that conservation is unnecessary. This is especially true since the utilities in this State are expected to promote conservation by their customers.

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While promotion of off-peak usage, particularly electric space heating, is touted by some as desirable because it might increase off-peak usage and thereby improve a summer-peaking company's load factor, we are convinced that off-peak promotion, especially in the context of imperfectly structured electric rates, is inconsistent with the public interest,[1] even if it could be divorced in the public mind from promoting electric usage generally. As we pointed out in our Policy Statement, increases in generation, even off-peak generation, at this time, requires the burning of scarce oil resources.[2] This increased requirement for fuel oil aggravates the nation's already high level of dependence on foreign sources of supply.

An additional area of legitimate State interest was pointed out by Chairman Kahn in his separate statement. The uncontrolled promotion of electric heating most likely means the installation of heat pumps, since they are the most promising mechanism for offsetting the relative inefficiency of converting fossil fuels into electricity; but installation of a heat pump means also installation of central air-conditioning. To this extent, promotion of off-peak electric space heating involves promotion of on-peak summer air-conditioning as well as on-peak usage of electricity for water heating. And the price of electricity to most consumers in the State does not now fully reflect the much higher marginal costs of on-peak consumption in summer peaking markets. In these circumstances, there would be a subsidization of consumption on-peak, and consequently, higher rates for all consumers. The promotion of electric consumption at rates that do not reflect the costs of it to society is not the kind of commercial speech contemplated by *Virginia Board of Pharmacy*.

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[1] Advertisements encouraging installation of heating equipment will frequently occur during the summer periods when air-conditioning usage is at its peak and when requests for conservation are being made.

[2] We distinguish here between promotional advertising designed to shift existing consumption from peak to off-peak hours and advertising designed to promote additional consumption during off-peak hours. It is the latter that we proscribe here.

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Our Statement recognized, however, that some companies have peaks occurring in the winter. To the extent rates cover long-run incremental costs for those companies, there is reason to believe that the promotion of off-peak sales may improve their load factors and benefit their customers. But, as former Chairman Kahn pointed out, before we know that this actually is the case, we must first ascertain whether the proper costing entity for marginal cost-based time-of-day rates is the individual company or the State system as a whole,[1] since if we allow winter-peaking companies to promote summer air-conditioning, we may be encouraging a greater expansion of capacity for the entire State, which as a whole is summer-peaking, than would be necessary or desirable.[2]

It is clear, therefore, that there are ample grounds here for regulation of commercial speech. Manufacturers and dealers, whom we do not regulate, remain free to promote the use of electric equipment and appliances. Such advertising will not provide the same misleading signals to the public and at the same time will provide a means for the public to be advised of the available alternatives.

Columbia Gas specifically objects to our decision to extend the ban on promotional activities by gas utilities to include direct contact with potential customers for the purpose of encouraging installation of dual-fuel equipment. Columbia Gas argues that this additional restriction is unnecessary since the Commission now exercises total control over the expansion of its market. Under existing restrictions it cannot take on new customers and it must inform potential customers that it has no gas available for their use. Our new restriction, the company argues, denies

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[1] This question is at issue in Case 26806 (Generic Electric Rate Proceeding). A decision is expected presently.

[2] Expressed another way, if the proper costing entity is the State rather than the individual company, the marginal costs of summer sales may be much higher than of winter sales even for winter-peaking markets.

it the possibility of obtaining new business if, and when, the natural gas supply situation improves and the company is authorized to take on new customers.

The specific purpose of our Order was to reduce the demand for gas. It would be inconsistent with this aim to permit a gas utility to promote the attachment of potential customers. In accordance with our past policy, however, we are prepared to modify, or even remove, this restriction upon a clear showing that the company has firm supplies of gas sufficient for it to engage in some limited promotional activity without lessening the supply of gas available to existing customers.

Political Advertising

Central Hudson also argues that our prohibition on the recovery through rates of expenditures for political advertising somehow violates its Constitutional rights. To support this claim, the company relies on *West Ohio Gas Co.* v *Public Utilities Comm'm*, 294 US 64 (1934) and *Virginia State Board of Pharmacy, supra.* Both cases, however, are inapposite. First, unlike the *Virginia* case, we are not prohibiting the company from expressing its position on matters of public controversy. We are simply not permitting a utility to pass along to its ratepayers the costs involved in publicizing its political views. *West Ohio* stands for the proposition that advertising is a legitimate business expense and, therefore, a reasonable allowance should be provided for this activity. It does not require a dollar-for-dollar reimbursement to the company for any and all expenses incurred.

Bill Inserts

Every utility filing a petition has alleged that our decision to prohibit the use of bill inserts to publicize its views on matters of public controversy violates the First Amendment and, in addition, is too vague. We reject these contentions.

First we think it pertinent that our prohibition in no way attempts to prohibit the companies from making their views

known. But use of the bill insert for this purpose is, in our judgment, improper since it gives a utility a unique and undue advantage in publicizing its position. The utility's billing records make available a selectively chosen target audience. Any material that is enclosed with a bill will be received by the customer since he has no alternative but to pay the bill if he desires continuation of his utility service. While it is up to the customer whether to read the matter contained in bill inserts, utility management obviously has a unique vehicle for getting its material into its customers' hands.

If the bill insert is turned into a mechanism to promote the management's views on controversial issues, the unique advantage of the billing mechanism is then transformed into a device for presenting only one side of this issue. We believe that this confers an unreasonable advantage on management that unduly discriminates against others who may not share or who oppose the company's views. Our previously announced ban on controversial material in bill inserts is to preserve the insert for matters that are not merely presentations by partisans on one side of a debate but which contain useful information on topics that are not controversial. In addition to the undue advantage conferred on management, there are several other factors that we also consider important.

The bill insert is not only a unique medium of communications, it is also quite limited: (1) the size and weight of the insert, in principle, should be such that it will fit in an envelope with the bill without increasing the weight of the total package so much as to require additional postage costs; and (2) an insert can be used only so often as a bill is sent by the utility company, usually once a month, but in many cases only once every other month. These limitations mean that utility companies could easily use up much of the scarce resource of bill insert communication by soliciting support for the industry's position on controversial public issues. Bill inserts can, and, in our view, should be used primarily to convey information that is clearly helpful to con-

sumers, such as practical steps that individuals can take to conserve energy. Our prohibition assures preservation of the latter public interest objective.

Since utilities have monopoly franchises conferred by the government, no other person or entity can provide utility service and thereby gain the wide, captive audience for bill inserts enjoyed by them. This makes the utility bill insert medium analogous to the limited radio spectrum, whose use is properly regulated by the government (specifically the Federal Communications Commission), to assure that those who are given the privilege to use limited spectrum space for the operation of radio and television stations act as trustees of the public interest.

Broadcasters, of course, are not precluded from airing their opinions. Indeed, they are encouraged to do so. But, they are required, by the FCC's "fairness doctrine" to present contrasting views on controversial public policy issues, because there simply is not enough spectrum space available to allow everyone with a unique point of view to operate a radio or television station. Since the same limitation is pertinent to utility bill inserts, we considered imposing something like a "fairness" or "equal time" requirement on the companies: if a utility stated its position on a controversial issue in a bill insert, it would have to give an organization with an opposing viewpoint a chance to disseminate its opinion as an insert with the utility's bill. While some of us preferred this approach, we were all convinced ultimately that it would be difficult to administer fairly,[1] and would tend to lessen undesirably the number of bill inserts dealing directly with such useful and uncontroversial information as consumer conservation measures.

It is for these basic reasons that we adopted our ruling. And it does not contravene the utilities' rights of free speech or press. Utility bill inserts are not newspapers which, in principle, any

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[1] We note that no utility company has submitted to us a proposal for handling controversial issues in bill inserts in this manner.

person is free to publish and thereby make his opinions known to the public. The privilege to disseminate utility bill inserts derives from the privilege of franchised monopoly, conferred by the government. It can, therefore, be regulated by the government to assure that it is exercised in the public interest.

We have not, of course, prohibited the utilities from expressing their corporate opinions on controversial public policy issues in any other media. They are free, like all other members of our society, to explain their positions on radio and television interviews, to seek to purchase space in newspapers, and to speak before public gatherings. For these kinds of communications, we merely require that the companies, rather than their customers, bear the costs.

The goal of free speech and of a free press is a well-informed electorate capable of making sound public policy decisions. Our ruling does not diminish to any substantial degree the utilities' ability to contribute to that goal. It does, however, preclude their monopolizing the unique utility bill insert medium.[1]

The petitioners also argue that the term "controversial issues of public policy" is too vague and does not give them any clear standards by which to judge the content of their bill inserts.

In the Guidelines, we discussed the various types of materials that would fall within our proscription. These Guidelines are admittedly general but we expect to give them greater definition through future advisory determinations. One such determination

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[1] We note also that where the ratepayer's bill is accompanied by political advertisement, the political material is, absent allocation, getting a free ride; the utility is deriving the economic benefit of postage, envelope, labor and overhead involved in the billing process. And even if an allocation of the expenses could be made, the actual cost of enclosing such material in the bill itself does not approach the one-sided benefit to the management of being able to use the unique billing process in presenting its side of the controversy. It is certainly questionable whether ratepayers should be compelled to support views with which they do not agree. See *Abood* v *District Board of Education,* 45 USLW 4473 (1977).

was made in our Policy Statement where we specifically included in this category expenses incurred in the preparation of materials designed to influence opinion in the current debate concerning the development of nuclear power. In its petition here, Con Edison requested a determination as to whether materials prepared in response to the demand by several elected officials for public operation of its facilities falls within the political category. We believe that it does and therefore should not be included as a bill insert. In the event a utility wishes additional guidance with respect to this matter, it should feel free to seek it. We will resolve any request expeditiously so that no undue delay will result.

Con Edison also states that under the Constitution, the field of postal regulation has been preempted by the Federal government. Claiming that our decision on bill inserts is such an interference with the mails, the company argues, therefore, that we have acted illegally. This argument is specious. Our prohibition involves neither direct physical interference with Federal postal activities nor a direct immediate burden on the performance of postal functions. Our Order is in no way an interference with the Federal regulation of the mails. See *Railway Mail Assoc.* v *Corsi*, 326 US 88 (1945).

Out-of-State Political Contributions

We restated in the Policy Statement our long-standing position that political advertising will not be considered a legitimate cost of doing business. Any such expenditures must be recorded below the line. See *Complaint of Grassroots Action, Inc.*, 13 NY PSC 630 (1973); *Statement of Policy on Advertising and Promotional Practices by Public Utilities*, 12 NY PSC 108-R (1972); *Accounting for Donations, Dues and Lobbying Expenditures*, 7 NY PSC 9-R (1967).

CPB is dissatisfied, however, and argues that out-of-state political contributions should be banned completely, claiming that any connection between out-of-state political actions and the New York operations of a utility is too remote.

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In *Grassroots*, we considered the issue of political contributions by utilities and held that, as long as these expenditures are minor, so that they have little or no effect upon a utility's financed stability, we will give our general consent and approval as required by Section 107 of the Public Service Law for non-utility-related expenditures. We stated that to require prior approval for each expenditure before a utility could speak out in the public forum on matters which could affect it would be undesirable. We see no reason to depart from this general policy even when out-of-state expenditures are involved.

PERCENTAGE LIMITATION ON ADVERTISING EXPENDITURES

New York Telephone argues that our guideline limitations on institutional and informational advertising[1] would result in significant reductions in reasonable advertising expenditures. The company argues that we erred in making no distinction among the various types of advertising that fall within these broad categories. For example, legally required notices and purely informational advertising, *i.e.*, notification of emergency procedures or changes in billing practices should fall outside the scope of our guideline limitations.[2]

NYT also claims that the ceiling on advertising expenditures imposed by our Guidelines serves no useful purpose since staff must still determine whether any particular advertisement is political or self-serving. In any event, the company points out the entire lump sum allowance may still be questioned in a rate proceeding.

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[1] The phrase "and informational" was inadvertently omitted from the last line of footnote 1 on page 13 of our Statement. The last line of that footnote should read "institutional and informational advertising allowance on brief."

[2] The company estimates that 1977 expenditures for informational and institutional advertising will exceed $4 million, including $600,000 for legally required notices. Under strict application of our Guidelines, only $1,635,000 would be recoverable from rates.

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We recognized that our new policy would not solve all the problems relating to advertising. It is, however, an improvement over our past practice of conducting an item-by-item examination and evaluation of past advertisements—a practice which took valuable staff time, time which could be far better used checking on other, quantitatively larger expense items. What we are doing here is establishing a relatively simple procedure to determine a reasonable allowance for future institutional and informational advertising. We intend to monitor the results of this new policy and to make any modifications necessary in light of this experience. We also recognize that expenses associated with legally required advertising vary depending on the territory served by the utility. We are prepared, therefore, to take such differences into account in applying our Guidelines to individual companies.

CONCLUSION

We have reviewed the petitions for rehearing filed in response to our *Statement of Policy on Advertising and Promotional Practices of Public Utilities* and conclude that they present no new arguments of fact or law which warrant modification of our Statement. The petitions are, therefore, denied.

The Commission orders:

1. The petitions for rehearing filed by the parties listed in the Appendix to this Order in response to our *Statement of Policy on Advertising and Promotional Practices of Public Utilities* and accompanying Order, issued February 25, 1977, are denied.

2. This proceeding is closed.

By the Commission,

(SEAL) (SIGNED) SAMUEL R. MADISON
Secretary

APPENDIX

Parties Filing Petitions for Rehearing

Central Hudson Gas & Electric Corporation
Columbia Gas of New York, Inc.
Consolidated Edison Company of New York, Inc.
New York State Electric & Gas Corporation
New York Telephone Company
Niagara Mohawk Power Corporation
Rochester Gas and Electric Corporation
Consumer Protection Board

Appendix E

Petition to the New York Supreme Court, Albany County

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

PETITION

Index No. 11317-77

In the Matter

of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Petitioner,

—against—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent,

for a judgment pursuant to Article 78 of the Civil Practice Law and Rules.

CENTRAL HUDSON GAS & ELECTRIC CORPORATION, by its attorneys, Messrs. Gould & Wilkie, hereby petitions the Supreme Court of the State of New York, Albany County, for a judgment pursuant to Article 78 of the Civil Practice Law and Rules annulling, vacating and setting aside certain provisions of an "Order Implementing Certain Restrictions on Utility Advertising" and "Statement of Policy on Advertising and Promotional Practices of Public Utilities" issued by the Public Service Commission of the State of New York on February 25, 1977 and of "Order Denying Petitions for Rehearing" issued by said Commission on July 14, 1977.

In support of such petition Central Hudson Gas & Electric Corporation alleges as follows:

1. Petitioner, Central Hudson Gas & Electric Corporation ("Central Hudson"), is an electric and gas utility corporation, duly incorporated under the laws of the State of New York, with

its principal office at 284 South Avenue, Poughkeepsie, New York. Central Hudson supplies electric and gas service to residents of the Mid-Hudson region of New York State.

2. Respondent, Public Service Commission of the State of New York ("Commission"), is an administrative body of the State of New York organized and existing under the *Public Service Law*. The Commission's principal office is in the City and County of Albany.

3. Petitioner, as an electric utility corporation, is subject to the regulatory authority of Respondent with regard to the electric and gas service furnished by Petitioner.

4. On February 25, 1977, Respondent issued an "Order Implementing Certain Restrictions on Utility Advertising" and "Statement of Policy on Advertising and Promotional Practices of Public Utilities" (herein "Order" and "Policy Statement", respectively). A copy of the Order is attached hereto as Exhibit A and a copy of the Policy Statement is attached hereto as Exhibit B.

5. The Policy Statement sets forth Respondent's determination to continue a prohibition on promotional advertising by electric utility corporations which had been originally established by it by Order issued on December 5, 1973.

6. The Policy Statement and Order establish Respondent's prohibition of the use by a public utility company of bill inserts (i.e., material inserted with bills sent to customers) as a means to disseminate its positions on matters of public controversy.

7. The Policy Statement sets forth Respondent's determination and policy to treat as "political", and therefore not properly chargeable to ratepayers, advertising on matters of immediate concern to Petitioner and its customers which relate to issues before the public, such as nuclear energy, environmental issues and energy policy in general.

8. On March 28, 1977, Petitioner filed with Respondent a petition for rehearing of the Order and Policy Statement pur-

suant to Section 22 of the *Public Service Law*, a copy of which is attached hereto as Exhibit C.

9. In its petition for rehearing, Petitioner urged Respondent to reconsider its positions set forth in the Order and Policy Statement on the grounds that (i) the continued prohibition of promotional advertising by electric utility corporations violates Petitioner's constitutional rights of freedom of expression, (ii) the prohibition of Petitioner's right to use bill inserts for the dissemination of its position on matters of public controversy violates Petitioner's Constitutional rights of freedom of expression and (iii) the determination and policy to disallow, as a proper charge for ratemaking purposes, the costs of advertisements on matters of immediate concern to Petitioner and its customers relating to issues before the public, such as nuclear energy, environmental issues and energy policy in general, are arbitrary and capricious and violate Petitioner's constitutional rights.

10. On July 14, 1977, Respondent issued an "Order Denying Petitions for Rehearing" (herein "Order on Rehearing"), a copy of which is attached hereto as Exhibit D.

11. In the Order on Rehearing, Respondent denied Petitioner's request for rehearing and reconsideration.

12. No previous application has been made to this Court or any justice thereof for the relief sought herein.

First Cause of Action

13. Petitioner repeats the allegations contained in paragraphs 1 through 5 and 8 through 12.

14. Respondent's prohibition of promotional advertising by Petitioner is not reasonable regulation of Petitioner's commercial speech and thus violates the First and Fourteenth Amendments of the United States Constitution and of Article I, Section 8 of the Constitution of the State of New York.

Appendix E

Second Cause of Action

15. Petitioner repeats the allegations contained in paragraphs 1 through 4, 6, and 8 through 12.

16. Respondent's prohibition of the use by Petitioner of bill inserts sent to its customers as a means of disseminating its position on matters of public controversy violates the First and Fourteenth Amendments of the United States Constitution and Article I, Section 8 of the Constitution of the State of New York as it improperly restricts the use by Petitioner of an available means of communicating with its customers.

17. Such prohibition of the use of bill inserts also violates the First and Fourteenth Amendments of the United States Constitution and Article I, Section 8 of the Constitution of the State of New York as it represents an attempt by Respondent to regulate speech on the basis of content.

18. Such prohibition of the use of bill inserts to disseminate Petitioner's position on "matters of public controversy" further violates the First and Fourteenth Amendments of the United States Constitution and Article I, Sections 6 and 8 of the Constitution of the State of New York as it attempts to establish a standard to regulate the speech of Petitioner which fails to give adequate notice of the scope of its proscription and which fails to give adequate guidance for its application and, consequently, is unconstitutionally vague and overbroad.

Third Cause of Action

19. Petitioner repeats the allegations contained in paragraphs 1 through 4 and 7 through 12.

20. Respondent's determination and policy to disallow, as a proper charge for recovery from ratepayers, the costs of advertisements by Petitioner on matters such as nuclear energy, environmental issues and energy policy in general, which are of immediate concern to Petitioner and its customers, are arbitrary and capricious as they represent an unwarranted invasion

by Respondent into the discretion of Petitioner's management and will deny recovery by Petitioner of costs which ultimately benefit its ratepayers.

21. Such determination and policy to disallow such advertising costs as reasonable costs for ratemaking purposes will work to deny Petitioner the opportunity to communicate on such matters in violation of the First and Fourteenth Amendments of the United States Constitution and Article I, Section 8 of the Constitution of the State of New York.

WHEREFORE, Petitioner requests this Court to:

(1) Review pursuant to Article 78 of the Civil Practice Law and Rules, the Order and Policy Statement and Order on Rehearing of Respondent, and enter a judgment annulling, vacating and setting aside said Order and Policy Statement and Order on Rehearing to the extent that they (i) prohibit advertisements by Petitioner which promote the use of electric energy, (ii) prohibit Petitioner from utilizing bill inserts as a means to disseminate its positions on matters of public controversy and (iii) establish a policy of disallowing for ratemaking purposes the costs of advertising by Petitioner on matters of immediate concern to Petitioner and its customers such as nuclear energy, environmental issues or energy policy in general;

(2) Declare that Respondent's Order and Policy Statement and Order on Rehearing violate Petitioner's constitutional rights and are arbitrary and capricious to the extent that they (i) prohibit advertisements by Petitioner which promote the use of electric energy, (ii) prohibit Petitioner from utilizing bill inserts as a means to disseminate its positions on matters of public controversy and (iii) establish a policy of disallowing for ratemaking purposes the costs of advertising by Petitioner on matters of immediate concern to Petitioner and its customers such as nuclear energy, environmental issues or energy policy in general;

(3) Grant Petitioner such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
November 4, 1977

GOULD & WILKIE

/s/
By DAVISON W. GRANT
A member of the firm
Attorneys for Petitioner
Central Hudson Gas &
Electric Corporation
One Wall Street
New York, N. Y. 10005
(212) 344-5680

[Verification and Exhibits Omitted]

Appendix F-1

Judgment of the Court of Appeals of the State of New York, May 1, 1979

Remittitur

COURT OF APPEALS, STATE OF NEW YORK

THE HON. LAWRENCE H. COOKE, Chief Judge, presiding

No. 151
In the Matter of
CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,
vs.
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent.

The appellant in the above entitled appeal appeared by Gould & Wilkie; the respondent appeared by Peter H. Schiff.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Cooke, Ch.J. Concur: Jasen, Gabrielli, Jones, Wachtler and Fuchsberg, JJ.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Albany County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

[SEAL]

JOSEPH W. BELLACOSA
Joseph W. Bellacosa,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany

May 1, 1979

Appendix F-2

Order of the Court of Appeals of the State of New York Denying Rehearing, July 9, 1979

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the ninth day of July A. D. 1979

PRESENT, HON. LAWRENCE H. COOKE, Chief Judge, presiding.

Mo. No. 597

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

A motion for reargument in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

[SEAL]

JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

Appendix G

Notice of Appeal to the Supreme Court of the United States, August 22, 1979

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 11317-77

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Petitioner,

–against–

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent,

for a judgment pursuant to Article 78
of the Civil Practice Law and Rules.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Central Hudson Gas & Electric Corporation, the Petitioner above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York entered in this action on July 9, 1979, denying Petitioner's motion for reargument of those portions of said Court's determination of May 1, 1979, which sustained the prohibition by the New York Public Service Commission of promotional advertising by electric utilities and denied Petitioner's petition herein.

Appendix G

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: August 17, 1979

Dated and Entered:
August 22, 1979
Office of Albany County Clerk
Albany, N. Y.

Yours, etc.

GOULD & WILKIE
One Wall Street
New York, New York 10005
(212) 344-5680

TAYLOR, FERENCZ & SIMON
60 East 42nd Street
New York, New York 10017
(212) 661-0930
Attorneys for Petitioner

To: Clerk of the Supreme Court,
Albany County
Albany County Courthouse
Albany, New York 12207

PETER H. SCHIFF, ESQ.
Counsel to the Public Service Commission
of the State of New York
Empire State Plaza
Agency Building No. 3
Albany, New York 12223
(518) 474-2510
Attorney for Respondent

Appendix G

AFFIDAVIT OF SERVICE

Index No. 11317-77

CERTIFICATE OF SERVICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Petitioner,

—against—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent,

for a judgment pursuant to Article 78
of the Civil Practice Law and Rules.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

THOMAS C. HUTTON, being duly sworn, deposes and says:

I am an associate of the law firm of Gould & Wilkie, One Wall Street, New York, New York 10005, attorneys for Central Hudson Gas & Electric Corporation, Petitioner.

On August 17, 1979, I served the annexed Notice of Appeal to the Supreme Court of the United States on the Public Service Commission of the State of New York, Respondent, by depositing a true copy of the same in a properly addressed wrapper with first class postage prepaid to Peter H. Schiff, Esq., General Counsel, Public Service Commission of the State of New York, Agency Building No. 3, Empire State Plaza, Albany, New York 12223 in an official mail box under the exclusive care and

custody of the United States Postal Service within the State of New York.

All parties required to be served have been served.

/s/
THOMAS C. HUTTON

Sworn to before me this
17th day of August, 1979

/s/
DOREEN M. SCHRAUFL
Notary Public

DOREEN M. SCHRAUFL
Notary Public, State of New York
No. 30-4606708
Qualified in Nassau County
Commission Expires March 30, 1981

Appendix H

NEW YORK PUBLIC SERVICE LAW,

Sections 4, subd. 1; 5, subd. 2; and 66, subds. 1, 2, 4 and 5.

§4. The public service commission

1. There shall be in the department of public service a public service commission, which shall possess the powers and duties hereinafter specified, and also all powers necessary or proper to enable it to carry out the purposes of this chapter. The commission shall consist of five members, to be appointed by the governor, by and with the advice and consent of the senate. A commissioner shall be designated as chairman of the commission by the governor to serve in such capacity at the pleasure of the governor or until his term as commissioner expires whichever first occurs. No more than three commissioners may be members of the same political party unless, pursuant to action taken under subdivision two, the number of commissioners shall exceed five, and in such event no more than four commissioners may be members of the same political party.

§5. Jurisdiction of public service commission

* * * *

2. The commission shall encourage all persons and corporations subject to its jurisdiction to formulate and carry out long-range programs, individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources.

§66. General powers of commission in respect to gas and electricity

The commission shall:

1. Have general supervision of all gas corporations and electric corporations having authority under any general or special law or under any charter or franchise to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality for the purpose of furnishing or distributing gas or

of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors, and all gas plants and electric plants owned, leased or operated by any gas corporation or electric corporation.

2. Investigate and ascertain, from time to time, the quality of gas supplied by persons, corporations and municipalities; examine or investigate the methods employed by such persons, corporations and municipalities in manufacturing, distributing and supplying gas or electricity for light, heat or power and in transmitting the same, and have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such gas or electricity and those employed in the manufacture and distribution thereof, and have power to order reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts and other reasonable devices, apparatus and property of gas corporations, electric corporations and municipalities; and have power after an investigation and a hearing to order any corporation having authority under any general or special law or under any charter or franchise, to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality for the purpose of supplying, selling or distributing natural gas, to augment its supply of natural gas, whenever the commission deems necessary and whenever artificial gas can be reasonably obtained, by acquiring by purchase, manufacture or otherwise a supply thereof to be mixed with such natural gas, in order to render adequate service to the customers of such corporation or to maintain a proper and uniform pressure; and have power after an investigation and a hearing to order any corporation having authority under any general or special law or under any charter or franchise, to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality for the purpose of supplying, selling or distributing artificial gas, to augment its supply of artificial gas, whenever the commission deems necessary and

whenever natural gas can be reasonably obtained, by acquiring by purchase or otherwise a supply thereof to be mixed with such artificial gas, in order to render adequate service to the customers of such corporation or to maintain a proper and uniform pressure; and to fix such rate for the supplying of mixed gas as shall secure to such corporation a fair return; and may order the curtailment or discontinuance of the use of natural gas for manufacturing or industrial purposes, for periods aggregating not to exceed four months in any calendar year, if it is established to the satisfaction of the commission that the supply of natural gas is not adequate to meet the reasonable demands of domestic consumption and may prohibit the use of natural gas in wasteful devices and practices.

* * * *

4. Have power, in its discretion, to prescribe uniform methods of keeping accounts, records and books, to be observed by gas corporations and electric corporations and by municipalities engaged in the manufacture, sale and distribution of gas and electricity for light, heat or power. It may also in its discretion prescribe, by order, forms of accounts, records and memoranda to be kept by such persons, corporations and municipalities. Notice of alterations by the commission in the required method or form of keeping a system of accounts shall be given to such persons or corporations by the commission at least six months before the same shall take effect. Any other and additional forms of accounts, records and memoranda kept by such corporations shall be subject to examination by the commission.

5. Examine all persons, corporations and municipalities under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business. Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates, charges or classifications or the acts or regulations of any such person, corporation or municipality are unjust, unreasonable, unjustly discriminatory or unduly preferential or in anywise in violation of any provision of law, the commis-

sion shall determine and prescribe in the manner provided by and subject to the provisions of section seventy-two of this chapter the just and reasonable rates, charges and classifications thereafter to be in force for the service to be furnished notwithstanding that a higher or lower rate or charge has heretofore been prescribed by general or special statute, contract, grant, franchise condition, consent or other agreement, and the just and reasonable acts and regulations to be done and observed; and whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the property, equipment or appliances of any such person, corporation or municipality are unsafe, inefficient or inadequate, the commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters.

* * * *

Appendix I

Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practice, July 28, 1976

NOTICE OF PROPOSED POLICY STATEMENT AND REQUEST FOR COMMENTS ON ADVERTISING BY PUBLIC UTILITIES AND ELECTRIC PROMOTION PRACTICES

(Issued July 28, 1976)

Over the years, the Commission has developed a series of policies relating to advertising by public utility companies and other practices designed to stimulate increased sales of electricity. Some of these policies have in recent months been called into question, and the Commission is considering revising them. To this end, we solicit comments from interested parties to be submitted, in writing, to the Secretary of the Commission, Empire State Plaza, Albany, New York, 12223, not later than September 13, 1976.

The promotion of electricity sales

On December 6, 1973, at the height of the energy crisis precipitated by the exporting countries' boycott, the Commission flatly prohibited all sales promotional activities by electric companies. We are now considering relaxing that prohibition.

There is one aspect of the proposed relaxation on which we do *not* solicit comments at this time. That would be such promotion as would be the incidental consequence of efforts by electric utility companies to publicize, explain, and advise consumers on how best to take advantage of time-of-consumption rates. As the companies introduce such rates, informational activities of this kind are clearly desirable, even where they might have the incidental effect of increasing the aggregate sales of electricity.

The proposition on which we do solicit reactions is that we relax our absolute prohibition of sales promotional activities by electric companies generally, apart from those that are merely

ancillary to the introduction of time-of-consumption rates. (The distinction will in important instances be difficult to draw: since the downstate companies are summer-peaking, one purpose or result of rates varying by the season of the year could be to promote the use of electric heating, and, largely because of the very heavy use of electricity involved, this is the most controversial promotion of all.)

On the side of continuing the flat prohibition are such considerations as the following:

1. Electric companies are franchised monopolists, and no public interest or need is served by permitting monopolists to promote sales.

2. It is especially undesirable to cover the costs of such promotional activities in rates, thereby forcing captive customers to pay for activities designed to influence their consumption habits (in contrast with merely providing them with information).

3. Turning specifically to the promotion of electric resistance space and water heating: it conflicts with the national interest in energy conservation to promote additional utilization of electricity, which by its very nature uses approximately 3 Btu's of source energy to deliver 1 usable Btu. Electric resistance heating is therefore inherently inefficient in its use of primary energy, compared with the direct buring of gas or oil in furnaces, even after making allowance for the greater efficiency-in-use of the electricity than those fuels.

4. The equipment for electric resistance heating is considerably less costly than for gas or oil. Since builders typically have a strong incentive to hold down the first costs of construction, they may already have a distorted incentive to install the former in preference to the latter, even though the result may be to impose markedly higher annual heating costs thereafter on the purchasers, who are frequently, perhaps typically, not in a position to weigh the higher future running costs against the

lower initial purchase price in making their purchase decisions. In these circumstances, it is particularly undesirable further to encourage irrational purchase decisions by permitting the promotion of electric heating.

5. The heat pump promises to mitigate some of these efficiency disadvantages of electric resistance heating; however, the effects of its widespread introduction on utility peak load and load factors are uncertain.

Arguing on the side of a relaxation are the following considerations:

1. In major uses, electricity competes with oil and gas, and while we proscribe the promotion of gas, the distribution of heating oils is totally outside our control, and advertising by those distributors freely permitted: in these circumstances, it is not only unfair but produces distorted results for consumers to be freely exposed to advertising messages by one set of competitors, while the other is totally prohibited from communicating with them.

2. Electricity and electrical appliances compete with all other goods and services for the consumer's limited dollars. It is inconsistent with a consumer-sovereign and free enterprise economy for certain goods and services to be denied the right to compete for those dollars while other competitors—many of which may be promoting even less energy-conserving consumption—remain unrestricted. It is the function of a regulatory Commission in such an economy to see to it that prices accurately reflect cost—not to go beyond that and dictate to consumers and businesses, directly or indirectly, how they should allocate their expenditures. Consumers are, to be sure, entitled to protection against misleading advertising, and the foregoing considerations would probably not absolve the Commission from responsibility to ensure that the promotional information supplied by franchised public utilities is in fact not misleading. The proper solution to the possible problem, described earlier, aris-

ing from the possibility that builders may have a distorted incentive to install electric resistance heating, because of its lower first cost, is to provide purchasers with reliable information about the expected life cycle costs of buildings equipped with different heating systems.

3. The function of the Commission is to see to it that the prices of the services it regulates reflect society's costs in supplying them, and that consumers are well-informed—not to tell consumers what advertising messages they may and may not hear.

4. Gas is in short supply, and in most territories unavailable for use in new construction, so that for most uses the only available alternative to electricity for space heating is oil. Prohibition of electricity promotion thus contributes to giving oil a monopoly in that market (whether this creates a danger of monopolistic exploitation depends on the effectiveness of competition in the oil industry).

5. While promotion of heating with electricity generated from oil (because of its less efficient use of the primary energy source) runs counter to our national policy of reducing our dependence upon imported oil, the increased use of electricity generated from nuclear fuel and coal would make a positive contribution to that goal.

6. Electric space heating is environmentally preferable to the direct combustion of oil: it is less polluting to burn fuels in central electricity generating stations than in thousands of individual furnaces.

* * * *

Appendix J

Selections from Opinion of United States District Court, Eastern District of New York, March 30, 1979

DOCKET NO. 77 C 972

MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LONG ISLAND LIGHTING COMPANY,

Plaintiff,

–against–

THE NEW YORK STATE PUBLIC SERVICE COMMISSION et al.

Defendants.

PRATT, J:

I. INTRODUCTION

Plaintiff Long Island Lighting Company (LILCO) commenced this action to declare unconstitutional and to enjoin enforcement of orders issued by defendant New York State Public Service Commission (PSC) which prohibit (1) LILCO's promotional advertising of electrical space heating for residential use. . . .

* * * *

B. *PSC's Policy and Orders.*

In 1973 PSC gave notice of a proposal to issue an order restricting certain uses of electric energy. Prompted by a critical shortage in fuel oil available to generate electricity in the state, PSC proposed a variety of energy saving steps, invited written comments on its proposals, and required each utility to publish the proposals immediately. In addition, PSC ordered that "all electric corporations are hereby prohibited from promoting the use of electricity through the use of advertising * * * ". LILCO did not then challenge that prohibition on advertising; instead, it complied with the order by ceasing to advertise electric space

heating, a method of residential heating it had actively promoted for a number of years.

In 1976 PSC undertook a reexamination of the subjects of advertising by utilities and the promotion of electricity sales, and after receiving comments on the proposed position, it adopted on February 25, 1977 a "Statement of Policy on Advertising and Promotional Practices of Utility Companies," (Policy Statement). As part of that statement PSC concluded "that the existing ban on promotion of electricity sales should be continued."

* * * *

IV. PSC's Ban on Promotional Advertising of Electrical Energy

A. *Factual Background.*

There are three principal methods of home heating available to consumers on Long Island: oil fired space heating, natural gas fired space heating, and electric space heating. Limitations on the supply of natural gas effectively limit the choice to oil and electricity.

LILCO experiences broad seasonal fluctuations in the demand for electrical power; demand increases during the summer months, attributable to air conditioner use, and decreases during the winter months. As a result, part of the generating capacity that LILCO requires to satisfy summer demand is not utilized during winter months when demand is lower.

To offset some of the fixed costs associated with owning and operating generating facilities all year, and thereby to use its generating facilities more efficiently, LILCO has in the past sought to stimulate electrical consumption during the winter months by advertising the advantages of electric space heating for residential use. Since almost all of LILCO's electrical generating capacity consists of oil fired generating stations, an increase in demand for electrical energy would increase the amount of oil required to generate it.

Appendix J

When the 1973 embargo on oil shipments from the Middle East to the United States caused a domestic oil shortage, PSC sought to limit the demand for electricity by forbidding all promotional advertising by utilities. LILCO complied with PSC's 1973 order and ceased its promotional advertising of electric space heating. Despite contentions that there was no longer a shortage of oil and that oil supplies were sufficient to serve current as well as additional customers of electrical energy, PSC in its 1977 Policy Statement and accompanying order continued its ban on promotional electricity advertising.

In continuing the ban, PSC noted that its highest priority was conservation of energy resources. It reasoned that increased off-peak generation of electricity consumes valuable energy resources and, if it is the result of increased sales, necessarily creates incremental air pollution and thermal discharges to waterways. Moreover, since most of the major utility companies use oil fired generating facilities, any increase in off-peak generation would aggravate the nation's already unacceptably high level of dependence on foreign sources of oil supply. PSC believed "that a continued proscription of promotion of electric sales will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales." 1977 Policy Statement at 5.

In short, PSC continued its ban on promotional advertising of electricity in order to reduce consumption of electricity and other energy resources. PSC did, however, permit public utilities to advertise time-of-day rates as a means of encouraging shifts of electrical energy consumption from peak to off-peak times, without increasing aggregate sales, and it indicated that should there be a sufficient change in conditions it would from time to time reexamine its ban on promotional advertising of electrical energy.

Although it may not advertise electric heat, LILCO is permitted to provide advice and information to any individual who requests such information. Moreover, PSC has not barred public

utilities from advertising the merits of gas fired space heating, nor does it restrict advertising for oil fired space heating, since PSC has no jurisdiction over oil dealers.

Without conceding their truth, LILCO has assumed the following allegedly material facts solely for purposes of the motion for summary judgment:

> 1. That electric space heating consumes more oil than oil fired space heating;
>
> 2. That electric space heating is ecologically less desirable than oil fired space heating;
>
> 3. That promotion of electric space heating may cause a general rise in the demand for electricity; and
>
> 4. That there is substantial difficulty in establishing a pricing structure for electric space heating service which accurately reflects the marginal cost of providing such service to each consumer.

PSC urges, however, that other allegedly material facts are in dispute and prevent summary judgment. First, PSC asserts that LILCO's concession on pricing structure is limited only to electric space heating, when the issue is whether the rates charged for *all* electric service can be based on an economically efficient pricing structure which would also adequately reflect the marginal costs of electric production for all consumers of electricity. Second, PSC contends that promotion of electric space heating will lead to greater use of heat pumps, which will in turn produce an increase in the peak-time (summer) consumption of electricity due to increased use of air conditioning. Finally, PSC claims there is a factual issue as to whether increased electric production by LILCO would result in increased use of energy inefficient gas turbines, the costs of which would be passed on to all of LILCO's customers, not just those who use electric space heaters.

These factual issues raised by PSC are more appropriate to a PSC proceeding involving the merits of electric heat or a proper

pricing structure for electric heat rates. They are not material to a decision on LILCO's first amendment challenge to PSC's flat ban on all promotional advertising of electrical energy. The issue is not whether PSC may directly prohibit or restrict the use of electric heat, but whether PSC may attempt to do so by preventing public utilities from truthfully advertising its advantages. On this issue the merits or demerits of electric heat are simply not material.

B. *Discussion.*

To decide this issue, the court must assess LILCO's and the public's first amendment interests in the free flow of information contained in the advertising, and then determine whether such interests are outweighed by the public interests allegedly served by the ban on such advertising. See *Bigelow* v. *Virginia, supra,* 421 US at 826; *Metpath, Inc.* v. *Imperato,* 450 F Supp 115, 117 (SDNY 1978).

To begin with, LILCO has an obvious economic interest in promoting the use of electrical energy and in advertising the availability of its services for electric space heating. That its interest is economic does not deprive it of first amendment protection. See *Bates* v. *State Bar, supra,* 433 US at 363-64; *Virginia State Board* v. *Virginia Citizens, supra,* 425 US at 762-63.

Beyond LILCO's economic interest is the public's interest in the free flow of information on the use of electrical energy for home heating. The consumer has a substantial interest in receiving truthful information on electric space heating. Not only does promotional advertising provide information of general public interest concerning electrical energy, it also assists an individual's economic decisions on the benefits and detriments of electric heat. Choosing among oil, gas, or electric residential heating may significantly affect his budget and daily comfort. Moreover, the public in general has an interest in receiving information on the various methods of heating, in order to

utilize energy resources ecologically and efficiently. As explained by Justice Blackmun, writing for the court in *Bates* v. *State Bar, supra,*

> [t]he listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decision making.
>
> *Bates* v. *State Bar, supra,* 433 US at 364 (citations omitted).

With respect to promotional advertising, then, "where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Virginia State Board* v. *Virginia Citizens, supra,* 425 US at 756.

The next question is whether the interests allegedly furthered by the PSC ban outweigh these first amendment interests.

As reflected in its 1977 Policy Statement, PSC's major reason for continuing its ban on promotional advertising was to curb the increased use of electricity in New York. Additional reasons offered have been the maintenance of an economically stable and efficient electric rate structure and preservation of the environment. PSC's position is clear from its counsel's argument:

> A reversal of the Commission's prohibition on advertising would prohibit the Commission from taking an effective means to curb the growth of electric usage in New York

> State, a growth that has over the past several years increased costs and rates, consumed expensive foreign oil and increased the environmental impact of public utility operations.
>
> Defendant's Memorandum of Law in Opposition to Motion for Summary Judgment, at 27.

Of course, these are legitimate interests which the state properly may seek to further; but it is the method used, a direct infringement of first amendment interests, that is under scrutiny.

PSC has not sought to limit the use of electricity directly; rather, by suppressing accurate promotional information it is attempting to avoid certain perceived detrimental effects of electric space heating. Although PSC's objectives might properly be achieved through direct regulation of electric space heating or, indeed, of all electric consumption, PSC is attempting an indirect regulation through the advertising ban, which, by deliberately inhibiting public awareness of the merits of electric heat, attempts to avoid increased consumption of electricity. This, PSC cannot do, because it is a significant interference with the first amendment. As the Supreme Court has observed,

> * * * it seems peculiar to deny the consumer * * * at least some of the relevant information needed to reach an informed decision. The alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, *we view as dubious any justification that is based on the benefits of public ignorance.*
>
> *Bates* v. *State Bar, supra,* 433 US at 374-75 (emphasis supplied).

Appendix J

In *Virginia State Board, supra,* a state licensing authority sought to justify a total ban on advertising the prices of prescription drugs sold by pharmacists. The Supreme Court observed:

> The strength of these proferred justifications is greatly undermined by the fact that high professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject.
>
> * * *
>
> * * * [T]he State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information.
>
> * * *
>
> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.
>
> * * *
>
> *It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First amendment makes for us.* Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them * * * in other ways. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering.
>
> *Virginia State Board* v. *Virginia Citizens, supra,* 425 US at 768-70 (emphasis supplied) (citations omitted).

Appendix J

PSC has statutory power to regulate the use of electrical energy directly by fixing rates, by approving construction of new generating facilities or expansion of existing ones, or by allocating quantities of energy production. See NY Pub. Serv. Law §66. But it may not do so "by keeping the public in ignorance" of the entirely lawful use of electric space heating. See *Virginia State Board, supra,* 425 US at 770.

PSC argues that the ban does not suppress information concerning electric heat because LILCO is not prohibited from discussing the topic with anyone who seeks information about it. However, permitting communication to a customer *if* he inquires, does not save the ban. The fact that the seller could provide information to a prospective purchaser who inquired did not save the bans on advertising lawyer services in *Bates* v. *State Bar, supra*; on posting "For Sale" signs on homeowners' lawns in *Linmark Associates* v. *Township of Willingboro, supra*; on advertising prices of prescription drugs in *Virginia State Board, supra*; or on advertising contraceptives in *Carey* v. *Population Services, supra.* Nor does it save PSC's ban on promotional advertising of electric heat.

PSC also argues that its ban does not unconstitutionally suppress information about electric heat because it does not affect advertising by appliance dealers who sell electric space heating devices. This argument is not persuasive. For one thing, PSC has no jurisdiction over such appliance dealers. In addition, "serious questions exist as to whether the [order] 'leaves open ample alternative channels of communication' ". *Linmark Associates, Inc.* v. *Township of Willingboro, supra,* 431 US at 93. PSC has presented nothing to show that appliance dealers have been advertising electric heat through newspapers, radio or any other media designed to reach a large audience. Its ban thus has the effect of suppressing virtually all truthful information concerning electric heat.

As the Court most recently observed:

> * * * the First Amendment * * * prohibit[s] government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of commercial information".
>
> *First National Bank* v. *Bellotti, supra,* 98 SCt at 1419-20.

Like the statutes and regulations challenged in other cases, PSC's ban on promotional advertising of electricity inhibits the "free flow of commercial information". Although the public interests sought to be served by PSC are important, it is not necessary to suppress protected speech in order to achieve those ends. Since the allegedly harmful consequences of increased usage of electric heat may be regulated by means that are not only more directly related to the results sought, but also less restrictive of LILCO's first amendment rights, PSC's ban on promotional advertising of electricity by public utilities is unconstitutional.

* * * *

Appendix K

Extracts of United States Congressional Committee Reports.

PUBLIC UTILITY REGULATORY POLICIES ACT, CONFERENCE COMMITTEE REPORT, H. R. Rep. No. 95-1750, 95th Cong., 2nd Sess. 77 (1978).

Section 113. Adoption of certain standards.

* * * *

The conferees stress that the standard on advertising prohibits recovery of expenditures for promotional or political advertising from anyone "other than the shareholders (or other owners)" of the utility, instead of prohibiting recovery from the electric consumers of the utility, as did the House bill. Without this change from the House bill, utilities for which the owners are also the electric consumers, i.e. cooperatives, could be effectively prohibited from undertaking any political or promotional advertising if this standard were adopted. Adoption of the standard does not prohibit any utility from engaging in this kind of advertising. The standard merely specifies who is to pay for the advertising.

NATIONAL ENERGY ACT, COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE REPORT, H. R. Rep. No. 95-496, Part 4, 95th Cong., 1st Sess. 138-40 (1977).

Section 512. Minimum Standards Respecting Advertising

Section 512 sets certain minimum Federal standards regarding the use of revenues recovered from electric consumers by States-regulated electric utilities for promotional, political or institutional advertising. Most States have restrictions similar or even stricter than those contained in this section. States may, of course, continue to have stricter standards. The section establishes that no rate of any State regulated utility using such revenues for such advertising will be found to be in compliance with subchapter B of chapter 2.

Appendix K

This ban on the use of consumer revenues does not apply to (1) advertising which informs electric consumers how they can conserve electric energy or reduce peak demand for electricity both of the system and of the individual electric consumer, (2) notices required by law or regulation, (such as information required to be given under part A of this title) or (3) public information regarding service interruptions, safety measures or emergency conditions, (4) advertising concerning employment opportunities with such utility and (5) public distribution or explanation of existing or proposed rate schedules or hearings thereon.

Certain terms are defined in section 512. The term "advertising" is defined to mean the commercial use by an electric utility of any media, including newspaper, printed matter, radio and television, in order to transmit a message to a substantial number of members of the public or to the utility's electric consumers. Billing inserts are clearly covered by this definition. "Institutional advertising" is defined to mean any advertising designed to create, enhance or sustain an electric utility's public image or goodwill with the general public or the utility's electric customers. "Political advertising" is defined to mean any advertising for the purpose of influencing public opinion with respect to any legislative, administrative, or electoral matter, or with respect to any controversial issue of public importance. Finally, the term "promotional advertising" is defined to mean advertising for the purpose of inducing the public to select or use the service or additional service of an electric utility or to select or install any appilance or equipment designed to use the utility's service.

The committee wishes to stress that section 512 does not prohibit advertising by electric utilities. The section merely states that if the utility wishes to undertake certain kinds of advertising, it may not do so with revenues recovered from its electric consumers. The committee does not wish in any way to discourage electric utilities from advertising electric energy conserving appliances or devices or on peak demand limiting techniques or

devices. Thus, section 512's restriction on the use of revenues recovered from electric consumers does not apply to such advertising, regardless of the fact that this advertising might be promotional in nature because it may induce consumers to purchase products which use electricity. In all cases it is intended that the energy conservation objective should be the principle of first importance.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF JURISDICTIONAL STATEMENT

CAMERON F. MACRAE
Attorney for Edison Electric Institute
140 Broadway
New York, New York 10005

Of Counsel:
RONALD D. JONES
JACOB FRIEDLANDER
HOWARD S. OCKMAN
LEBOEUF, LAMB, LEIBY & MACRAE
140 Broadway
New York, New York 10005

October, 1979

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Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF JURISDICTIONAL STATEMENT

Edison Electric Institute ("EEI") hereby submits its brief *amicus curiae* in support of the jurisdictional statement filed on October 5, 1979 ("Jurisdictional Statement") by appellant Central Hudson Gas & Electric Corporation ("Central Hudson") in the captioned appeal from a judgment of the Court of Appeals of the State of New York entered in this case on July 9, 1979, denying rehearing of a judgment entered May 1, 1979, which upheld the federal constitutionality of the Public Service Law of New York State as construed and applied by the Public Service Commission of the State of New York ("Commission") in its orders of December 5, 1973, February 25, 1977, and July 14, 1977 prohibiting electric utility companies subject to the Commission's jurisdiction from advertising the use of

electrical energy. These orders are companions of the orders challenged in *Consolidated Edison Co.* v. *Public Service Commission* (No. 79-134), 47 N.Y.2d 94, 417 N.Y.S.2d 30 (1979), probable jurisdiction noted October 1, 1979.* In accordance with this Court's Rule 42, Edison Electric Institute has received the written consent of counsel for both parties to file this brief *amicus curiae.* Copies of the consents have been filed with the Clerk.

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported at 47 N.Y.2d 94, 417 N.Y.S.2d 30 (1979), and is set forth in Appendix A to the Jurisdictional Statement at 1a-14a.** The opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, is reported at 63 A.D.2d 364, 407 N.Y.S.2d 735 (1978), and is set forth in Appendix B to the Jurisdictional Statement at 15a-21a. The opinion of Special Term, New York Supreme Court, Albany County is not reported, and is set forth in Appendix C of the Jurisdictional Statement at 22a-24a. The three opinions of the Public Service Commission are reported in 13 N.Y. P.S.C. 2072, 17 N.Y. P.S.C. 1-R, and 17 N.Y. P.S.C. 17-R, and are set forth in Appendices D-1, D-2, and D-3 respectively of the Jurisdictional Statement at 25a-67a.

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* A petition for a Writ of Certiorari Prior to Judgment to the United States Court of Appeals for the Second Circuit was filed in this Court by Long Island Lighting Company on October 15, 1979 in the case of *Long Island Lighting Co.* v. *Public Service Commission,* No. 77C 972 (E.D.N.Y. March 30, 1979), *appeal docketed,* No. 79-7375 (2d Cir. April 30, 1979); *pet'n for cert. filed,* October 15, 1979. Petitions have also been filed by other parties in that case which challenges the same orders in controversy in the case at bar and in *Consolidated Edison Co., supra.*

** All references to Appendices refer to the Appendix To Jurisdictional Statement filed by Central Hudson on October 5, 1979, No. 79-565.

Jurisdiction

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(2), the appeal drawing in question the validity of a statute of the State of New York as interpreted by the Court of Appeals of the State of New York, and the validity of an order of the Public Service Commission of the State of New York promulgated pursuant to such statute, on the ground of repugnancy to the Constitution of the United States, specifically the First and Fourteenth Amendments thereto, and the decision below having been in favor of the validity of the statute as interpreted and in favor of the validity of the order.

Questions Presented

1. Whether the Public Service Law, as so construed by the Court of Appeals and as applied in this case by the Public Service Commission, and the Commission's orders banning advertising by electric utility companies informing the public of uses of electricity, facially or as applied to appellant, are in violation of the First Amendment, as made applicable to the States by the Fourteenth Amendment; and

2. Whether the Public Service Law, as so construed and applied, and the Public Service Commission's orders, facially or as applied, are in violation of the Equal Protection clause of the Fourteenth Amendment.

Statutes Involved

Section 4, subd. 1, Section 5, subd. 2, and Section 66, subds. 1, 2, 4 and 5 of the New York Public Service Law were held by the New York courts to authorize the promul-

gation of orders by the Commission prohibiting the promotion of the use of electricity through the use of advertising by all electric utilities. The Court of Appeals' interpretation of the Public Service Law of New York State has the force of law. The Court of Appeals has made such an interpretation in upholding the validity of the Commission's orders of December 5, 1973, February 25 and July 14, 1977. That interpretation is challenged facially and as applied.

The text of the provisions of the Public Service Law cited above are set forth in Appendix H of the Jurisdictional Statement at 80a-83a and the text of the Commission's three orders are set forth in Appendices D-1, D-2, D-3 at 25a-66a.

Interest of Edison Electric Institute

Edison Electric Institute is the principal national association of electric utility companies. Its members serve 99.1 percent of all customers of the investor-owned segment of the utility industry and supply 77.1 percent of the nation's electricity. The decision of the Court of Appeals of the State of New York from which this appeal is taken concerns a vital interest of EEI and its members—their freedom of speech to disseminate truthful and accurate information concerning the uses and availability of electric service.*

Statement

The salient features of the decisions below are described in the Statement of the Case provided in appellant's Jurisdictional Statement at page 4 to page 7. That discussion need not be repeated here.

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* The same orders in controversy in this case are challenged in *Long Island Lighting Co.* v. *Public Service Commission, supra,* p. 2n., and a Petition for a Writ of Certiorari has been filed. The issues in that case are of comparable national importance, and EEI believes that *certiorari* should be granted.

The constitutional questions raised by the order of the Public Service Commission and the Public Service Law of the State of New York, as applied, have far-reaching implications for all of the nation's investor-owned electric utilities, especially those engaged in the provision of service to retail customers. As questions of energy supply and distribution have moved to the forefront of national attention, the freedom of utilities to disseminate accurate information about the uses of the services they offer has gained in significance, both to the utilities and to the public who require electric service and other forms of energy. A total and absolute ban on the dissemination of such information, such as that imposed by the Commission, leaves the utilities with no alternative means of communication on the issue and the consumer with no alternative source for complete and accurate information.

In a period in which consumers must make difficult choices among alternative energy sources and difficult decisions concerning the expenditure of their limited resources, it is of the utmost importance that utilities be free to supply truthful information to assist in these decisions. Any complete prohibition imposed on electric utilities, and not on their competitors who supply other forms of energy, deprives the utilities of the ability to compete adequately with those suppliers and deprives the consumer of complete information on which to rely in his selection of energy sources.

The decision of the New York Court of Appeals appealed from should be reversed. No compelling government interest is served by a complete and total ban on dissemination of information concerning electric utilities' available services. In the absence of such government interest, the First and Fourteenth Amendments protect the freedom of speech of appellant and other electric utilities; and also

protect the right of the public to receive the proffered information. The discrimination between electric utilities and their competitors who are not covered by the Commission's ban is irrational and violates the Equal Protection clause of the Fourteenth Amendment. Accordingly, the Commission's order should be invalidated.

ARGUMENT

1. The Commission's total ban on truthful advertising designed to disseminate information concerning electric services violates the First Amendment.

The ban imposed by the Public Service Commission and upheld by the Court of Appeals of the State of New York is a purely content-based prohibition, not a regulation of "time, manner and place of communication," and is in violation of the First Amendment. All unsolicited communications informing the public of uses of electricity are banned under any circumstances, regardless of their character, quality, style or purpose. Absent some compelling justification, such as the likelihood that speech will incite "imminent lawless action," content-oriented restrictions may not stand. *Brandenburg* v. *Ohio*, 395 U.S. 444, 477 (1969); *see Hess* v. *Indiana*, 414 U.S. 105 (1973); *United States* v. *O'Brien*, 391 U.S. 367, 376-377 (1968). As a clearly content-based prohibition, it is subject to an exacting standard of review. *See Elrod* v. *Burns*, 427 U.S. 347 (1976), *First National City Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776 (1978).

The fact that "commercial" rather than "political" speech is at issue here does not alter the importance of the First Amendment principles involved. This Court, in a

developing line of cases, has recognized the constitutional protection afforded to so-called "commercial speech." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977); *Carey* v. *Population Services, Inc.*, 431 U.S. 678 (1977); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977).

Although the Court has recognized "commonsense differences" between commercial and other varieties of speech, *Virginia Pharmacy*, 425 U.S. at 771, *Bates*, 433 U.S. at 381, none of the reservations which appear in other "commercial speech" cases applies to the case at hand. As stated above, this is a total ban on a particular content of speech, not a mere restriction by "time, place or manner." In *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978), this Court held that dissemination of commercial data in an unduly coercive manner cannot claim First Amendment protection. No finding that the utilities' advertising was unduly coercive was made here; rather, the Commission moved immediately to its absolute ban. Such a total ban on advertising cannot be sustained merely because some regulation of advertising is appropriate under *Ohralik*. *See Bates, supra*.

The Court of Appeals held that the Commission's total and all-inclusive ban on the dissemination of information was a "reasonable measure" to "prevent wasteful consumption or unneeded expansion of utility services." Appendix A at 5a. This Court has invalidated similar attempts by well-meaning public officials to influence behavior by controlling commercial speech.

In *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977), Mr. Justice Marshall writing for a unanimous Court rejected the notion that government may

regulate the flow of accurate information merely because it believes that such information might have "detrimental" social consequences. As Mr. Justice Marshall noted:

> "After *Virginia Pharmacy Bd.* it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is 'detrimental.' " 431 U.S. at 92, n. 6.

In words particularly appropriate to the case at bar, Mr. Justice Marshall wrote:

> "The constitutional defect in this ordinance, however, is far more basic. . . . The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners self-interest and the corporate interest of the township. . . . As we said . . . in rejecting Virginia's claim that the only way it could enable its citizens to find their self-interest was to deny them information that is neither false nor misleading: 'There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them . . .' " [Quoting from *Virginia Pharmacy Bd., supra,* at 770.] 431 U.S. at 96-97.

In *Carey* v. *Population Services, Inc.,* 431 U.S. 678 (1977), this Court again refused to tolerate the suppression of accurate information as a permissible means of regulating public behavior by invalidating a prohibition on the

advertising of contraceptives in New York State. Likewise, in *Bigelow* v. *Virginia,* 421 U.S. 809 (1975), this Court upheld the legality of the dissemination of information to Virginians about the availability of abortions in New York (where they were legal) despite the illegality of abortions in Virginia.

These cases exemplify an increased concern with the right of the public to receive all available information relevant to the making of an informed choice among equally lawful courses of conduct. As explained by Mr. Justice Blackmun, writing for the Court in *Bates, supra:*

> "The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. . . . Advertising, though entirely commercial, may often carry information of import to significant issues of the day. . . . In short, such speech serves individual and societal interests in assuring informed and reliable decision making." 433 U.S. at 364.

In an area so basic to our national interest as the selection of energy sources, it is of the utmost importance that information be freely available. If the Commission seeks social control of the selection of energy sources, "the remedy to be applied is more speech, not enforced silence." *Whitney* v. *California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring.) In *Long Island Lighting Company* v. *Public Service Commission, supra,* (unreported; set out in relevant part in Jurisdictional Statement, App. J at 88a-97a), a United States District Court case in which the same orders challenged here were held to be unconstitutional, Judge Pratt recognized the significance to the public of the "free flow of information on the use of electrical energy" both to

assist in "an individual's economic decisions" and so that the public may "utilize energy resources ecologically and efficiently." (Appendix J at 92a-93a).

By attempting to control the use of electricity through restrictions on speech, the Commission has prohibited the dissemination of information concerning innovative applications of electrical energy which might increase the use of electric energy, but could, at the same time, reduce the total consumption of fuels. If the Commission wishes to limit electric usage, it could publicize its concern or penalize the disfavored act without imposing an absolute ban on utility advertising. In adopting its ban, the Commission is attempting to control consumer behavior by a paternalistic manipulation of the flow of information rather than relying on the public's ability to decide among various options. The Commission's position implies that consumers are unable to judge for themselves whether to act responsibly in the area of electrical consumption. As Mr. Justice Blackmun wrote in *Bates, supra:*

> "the prohibition of advertising serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, *we view as dubious any justification that is based on the benefits of public ignorance.*" 433 U.S. at 374-75. (emphasis added).

No beneficial public purpose can be served by impeding the flow of information on energy sources within society. The public must have access to accurate data in order to

make informed choices. Electric utilities are in a position to provide such information, but, in New York, are prevented from doing so by the Commission's ban on advertising. Electric utilities must continually improve their knowledge of current and future sources of and uses for electrical energy. This knowledge can and should be made available to the public. Although an element of self-interest is, of course, present in any commercial advertising, this is not a ground for prohibiting the advertising.

> "Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act." *Eastern R.R. Presidents' Conference* v. *Noerr Motors Freight*, 365 U.S. 127, 139 (1961).

This statement applies equally as strongly to information on which individuals must rely in order to make decisions. That other sources of information concerning electric usage may be available in no way justifies the stifling of the electric utilities' right to be heard. Nor is the fact that the speaker is a regulated utility a justification for such limitations on First Amendment freedoms. In *Bellotti, Virginia Pharmacy, Carey,* and *Bates, supra,* the disseminators of the information were under extensive regulation, yet the ban on advertising in all these cases was invalidated.

Certainly, the conservation of energy is of national concern. However, the attempt by the Commission to achieve this goal through impairment of the free flow of information is in violation of the First Amendment and should be invalidated.

2. The order and the authorizing statute are unconstitutional under the Equal Protection Clause.

The promotional ban applies only to electric utilities. It does not apply to non-utility suppliers of energy, such as heating oil distributors. In view of the stated purpose of the Commission's order, which is to conserve oil supplies, this discrimination against electric utilities is irrational and violates the Equal Protection clause of the Fourteenth Amendment.

This Court has painstakingly evolved an equal access principle in the area of First Amendment rights which forbids the government from discriminating among speakers on the basis of content. *Williams* v. *Rhodes,* 393 U.S. 23 (1968); *Cox* v. *Louisiana,* 379 U.S. 536 (1965); *Cox* v. *New Hampshire,* 312 U.S. 569 (1941). In *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972), Mr. Justice Marshall wrote for a unanimous Court:

> "[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content. . . . Selective exclusions from a public forum may not be based on content alone. . . . Guided by these principles, we have frequently condemned such discrimination among different users of the same medium for expression." 408 U.S. at 95-96.

In the case at hand, the Commission has not merely prevented access to a particular forum on the basis of content of speech, but has closed access to all forums to the electric utilities resulting in the grant of a virtual informational monopoly to the proponents of other energy sources. This grossly discriminatory scheme violates basic tenets of both Equal Protection and the First Amendment.

Moreover, the imposition of the ban only on electric utilities, among suppliers of energy, is irrational in that the stated purpose of the ban is to conserve oil. Electrical energy is produced from many sources other than oil,* and the Commission's ban, accepting its stated purpose, is far too broad. This Court has stated that, "[t]he Equal Protection Clause requires that statutes affecting First Amendment rights be narrowly tailored to their legitimate objectives." *Mosley, supra,* at 101. In the case at hand, even the Commission recognized that "a continued ban . . . may aptly be described as piecemeal conservationism since promotion of oil for use in heating or internal combustion is not similarly proscribed." Jurisdictional Statement, Appendix D-2 at 37a. The Commission's order is not "narrowly tailored" to its objective. Rather, it allows many aspects of the oil consumption issue to be aired freely while imposing an absolute ban on the dissemination of information on one view—that of the utilities.

No rational, let alone compelling, state interest has been demonstrated by the government sufficient to justify such discrimination in restricting freedom of speech. Where fundamental freedoms are involved, a compelling state interest must be demonstrated. As Mr. Justice Powell wrote in *San Antonio Ind. School Dist.* v. *Rodriquez,* 411 U.S. 1 (1973), referring to the *Mosley* case:

> "The stricter standard of review was appropriately applied since the ordinance was one 'affecting First Amendment interests.'" 411 U.S. at 34, n. 75.

The ban on the fundamental freedom of speech is discriminatory and irrational and no compelling state interest

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* Seemingly, the Commission's prohibition bars the promotion of the use of electricity derived from sources such as wind or water power, methods which assuredly conserve fuels.

has been demonstrated. The Public Service Law, as construed, and the Commission's order should be held invalid under the Equal Protection clause.

CONCLUSION

This Court should note probable jurisdiction in order to review the decision of the New York Court of Appeals sustaining the ban of the Commission on promotional advertising. That decision, with its far-reaching implications for the investor-owned utilities industry, presents substantial federal questions of public importance and should be reviewed as violative of the Equal Protection clause and the First Amendment rights of Central Hudson.

Respectfully submitted,

CAMERON F. MACRAE
Attorney for Edison Electric Institute
140 Broadway
New York, New York 10005

Of Counsel:

RONALD D. JONES
JACOB FRIEDLANDER
HOWARD S. OCKMAN
LEBOEUF, LAMB, LEIBY & MACRAE
140 Broadway
New York, New York 10005

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APPENDIX

Jurisdictional Statement Filed October 5, 1979

Probable Jurisdiction Noted November 26, 1979

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The following opinions, decisions, judgments and orders have been omitted in printing this appendix because they appear on the following pages in the Appendix to the Jurisdictional Statement:

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Judgment and Order of the Court of Appeals of the State of New York, May 1, 1979	74a
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Notice of Appeal to the Supreme Court of the United States, August 22, 1979	76a

Chronological List of Important Dates

12- 5-73 Notice of Proposal to Issue Order Restricting Certain Uses of Electrical Energy issued by the Public Service Commission of the State of New York.

7-28-76 Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities Electric Promotion Practices issued by the Public Service Commission of the State of New York.

2-25-77 Statement of Policy on Advertising and Promotional Practices of Public Utilities issued by the Public Service Commission of the State of New York.

3-28-77 Petition of Central Hudson Gas & Electric Corporation for Rehearing of the Statement of Policy on Advertising and Promotional Practices of Public Utilities served.

7-14-77 Order of the Public Service Commission of the State of New York Denying Petitions for Rehearing issued.

11- 4-77 Notice of Petition, Verified Petition and Affidavit in Support of Petition served.

11-29-77 Verified Answer served.

12- 6-77 Reply to New Matter served.

2-17-78 Opinion of the New York Supreme Court, Albany County, issued.

3-14-78 Judgment of New York Supreme Court, Albany County, entered.

3-14-78 Notice of Appeal to the New York Supreme Court, Appellate Division, Third Judicial Department, served and filed.

3-22-78 Notice of Cross Appeal to the New York Supreme Court, Appellate Division, Third Judicial Department, served and filed.

7-27-78 Opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, issued.

8- 2-78 Order of the New York Supreme Court, Appellate Division, Third Judicial Department, entered.

8-30-78 Notice of Appeal to the Court of Appeals of the State of New York served.

9- 1-78 Notice of Appeal to the Court of Appeals of the State of New York filed.

5- 1-79 Opinion of the Court of Appeals of the State of New York issued.

5- 1-79 Judgment and Order of the Court of Appeals of the State of New York entered.

5-30-79 Notice of Motion for Reargument served.

7- 9-79 Order of the Court of Appeals of the State of New York denying Motion for Reargument issued.

8-22-79 Notice of Appeal to the Supreme Court of the United States served and filed.

Affidavit in Support of Petition of Central Hudson Gas & Electric Corporation

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

Index No. 11317-77

In the matter of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Petitioner,

against

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent,

for a judgment pursuant to Article 78
of the Civil Practice Law and Rules.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DAVISON W. GRANT, being duly sworn, deposes and states:

1. I am a member of the law firm of Gould & Wilkie, attorneys for Central Hudson Gas & Electric Corporation ("Central Hudson"). I am familiar with the matters set forth herein.

2. Since issuance of an order on December 5, 1973, Respondent, Public Service Commission of the State of New York ("Commission"), has had banned promotional advertising by electric utility corporations. A copy of such order is attached hereto as Exhibit 1. [Exhibit omitted in printing; printed previously in the Appendix to the Jurisdictional Statement (25a-31a).]

3. On July 28, 1976, the Commission issued a "Notice of Proposed Policy Statement and Request for Comments on Ad-

vertising by Public Utilities and Electric Promotion Practices" (herein "Initial Notice"). A copy of the Initial Notice is attached hereto as Exhibit 2. [Exhibit omitted in printing; printed previously in the Appendix to the Jurisdictional Statement (84a-87a).]

4. The Initial Notice indicated that the Commission was seeking comments on whether its ban on promotional advertising by electric utility corporations should be relaxed. As the Initial Notice stated on page 1:

> "On December 6[sic], 1973, at the height of the energy crisis precipitated by the exporting countries' boycott, the Commission flatly prohibited all sales promotional activities by electric companies. We are now considering relaxing that prohibition."

5. The Initial Notice also requested comments from interested parties with regard to possible changes in its policies and procedures relating to what it described as institutional and informational advertising of public utilities.

6. Pursuant to the Initial Notice, comments were to be submitted in writing to the Secretary of the Commission, not later than September 13, 1976.

7. On September 10, 1976, Central Hudson's Vice President —Community Affairs and Corporate Services submitted to the Secretary of the Commission a letter setting forth Petitioner's comments with respect to the matters for which comments were sought by the Initial Notice. A copy of such letter is attached hereto as Exhibit 3.

8. Such letter urged the Commission to reconsider its policy and ban on promotional advertising in light of a recent United States Supreme Court decision concerning regulation of commercial speech, *Virginia State Board of Pharmacy* v. *Citizens Consumer Council*, 425 U. S. 748, 48 L Ed 2d 346 (1976). Central Hudson also urged in such letter that the Commission consider a

non-restrictive, non-paternalistic approach to public utility advertising. As was stated in such letter on page 2:

> "We do ask that a strong and overriding emphasis be given to freedom of speech and that utilities be given every opportunity to operate outside of the present restrictive (by Commission admission) control of the Commission."

9. On February 25, 1977, the Commission issued "Order Implementing Certain Restrictions on Utility Advertising" and "Statement of Policy on Advertising and Promotional Practices of Public Utilities" (herein "Order" and "Policy Statement", respectively), copies of which are attached to the Petition herein as Exhibits A and B.

10. With respect to the proposed relaxation of the ban on promotional advertising by electric utility corporations, the Policy Statement indicated that no relaxation of that ban would be entertained. As was stated on page 5 of the Policy Statement:

> "We conclude that the existing ban on promotion of electricity sales should be continued. . . . Further, we shall continue to maintain surveillance of all advertising activities engaged in by electric utilities, and where deviations from the requirement of our order are found, we will take remedial action, including adjustments in rate cases, to bring about compliance."

11. The primary reason given by the Commission for its decision to continue its ban on promotional advertising by utilities was its fear that such advertising might cause consumers to waste energy or to cause them to believe that energy conservation was not necessary.

* * *

16. On March 28, 1977, Central Hudson filed with the Commission a petition for rehearing of the Order and Policy

Statement pursuant to Section 22 of the *Public Service Law*. A copy of such petition for rehearing is attached as Exhibit C to the Petition herein.

17. In its petition for rehearing Central Hudson urged the Commission to reconsider its continuation of the prohibition of promotional advertising, the prohibition of the insertion with bills sent to customers of materials presenting Central Hudson's position on matters of public controversy and the decision not to allow for ratemaking purposes the costs of advertising on matters of public debate. Central Hudson pointed out to the Commission that the Policy Statement and Order could be considered repressive and violative of principles of free speech embodied in the United States Constitution.

18. In its petition for rehearing Central Hudson called the Commission's attention to the fact that in *Virginia State Board of Pharmacy* v. *Citizens Consumer Council, supra,* the United States Supreme Court had held that a state agency cannot prohibit dissemination of truthful information solely on the basis that the agency fears that such information will induce consumer behavior which the agency considers not desirable. For this reason, Central Hudson submitted, the Commission could not ban truthful advertising by utilities promoting use of electric energy solely on the basis of its fears that such advertising might cause waste of energy or cause consumers to believe that energy conservation might not be necessary.

* * *

21. On July 14, 1977, the Commission issued an "Order Denying Petitions for Rehearing" (herein "Order on Rehearing"), a copy of which is attached as Exhibit D to the Petition herein.

22. In the Order on Rehearing the Commission denied Central Hudson's petition for rehearing.

23. While Central Hudson believes the Commission's prohibition of promotional advertising may be set aside purely on legal grounds, a brief description of the factual context in which such prohibition operates is provided to the Court. The purpose of promotional advertising by an electric utility is to more effectively utilize available generating capacity. This can be best done by promoting the consumption of electric energy during off-peak periods.

24. Since an electric utility has a legal obligation to supply electric energy on demand, it must construct (or contract to purchase) enough generating capacity to meet the needs of its customers during the period their demand for electricity is the greatest. Since human activity or demand for electric energy is not constant throughout the day or year, the demand made by customers for available electric generating capacity fluctuates. During the night when human activity diminishes, demand for electric energy declines from the level experienced during the day. During the spring and fall when temperatures are mild, demand for electric energy is lower than during the summer or winter.

25. As a result of this fact, much available electric generating capacity is underutilized during the night and during the spring and fall. If during these periods of lower utilization electric consumption could be stimulated, the carrying costs of the available capacity could be spread over more units of consumption and rates for electricity could be decreased or the need for rate increases could be diminished.

26. It is precisely the opportunity to spread costs over greater units of consumption which the Commission seeks to deny Central Hudson by its ban on promotional advertising.

27. Aside from more efficient utilization of available generating capacity, advertising promoting certain uses of electric energy may ultimately prove to foster energy conservation. But

it is precisely the realization of this potential which the Commission's prohibition on promotional advertising will tend to frustrate.

28. If the Commission wishes to promote conservation of energy, it should attempt to do so directly by means within its jurisdiction. It cannot, however, take the expediency of abridging Central Hudson's freedom of expression to attempt to achieve that goal.

29. Likewise, the fears expressed by the Commission in the Policy Statement and Order on Rehearing that promotion of electric consumption off-peak may somehow confuse people into believing that energy conservation at other times is not necessary or that such promotion of off-peak electric consumption will increase our nation's dependence on foreign oil are not adequate justification for the prohibition of all promotional advertising. The fears of a governmental body of the effect of truthful information on its recipients may not be used as a basis to prohibit dissemination of such information.

30. The Commission's prohibition of promotional advertising by electric utilities represents an overly paternalistic approach to free speech issues and represents a distrust of the ability of the public to make proper decisions based on available information. It is precisely this type of overly paternalistic governmental restriction which the First Amendment seeks to prevent by prohibiting restraints on the exercise of free speech. Accordingly, the Commission's prohibition of promotional advertising must be struck down.

* * *

40. The Commission, by (i) its prohibition of promotional advertising, (ii) its prohibition of using bill inserts on matters of public controversy, and (iii) its policy of disallowing as reasonable costs for ratemaking purposes the costs of advertising which benefit ratepayers on certain public issues such as nuclear power,

energy policy and environmental matters, is violating Central Hudson's constitutional rights and has acted in an arbitrary and capricious manner.

DAVISON W. GRANT
Davison W. Grant

Sworn to before me this
9th day of November, 1977.

DOREEN M. GROSS

. . . . . .

Notary Public

DOREEN M. GROSS
Notary Public, State of New York
No. 30-4606708
Qualified in Nassau County
Commission Expires March 30, 1979

[Affidavit of Service omitted in printing]

* * *

Exhibit 3 Appended to Affidavit in Support of Petition of Central Hudson Gas & Electric Corporation

[CENTRAL HUDSON LETTERHEAD OMITTED IN PRINTING.]

September 10, 1976

Mr. Samuel R. Madison, Secretary
Public Service Commission
Empire State Plaza
Albany, New York 12223

Dear Mr. Madison:

This letter constitutes Central Hudson's response to the Public Service Commission's Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices (issued July 28, 1976).

The Company believes that the Commission should allow utilities to freely advertise—first, because utilities are guaranteed freedom of speech and second, because utilities are responsible corporate citizens and are more dedicated to the public interest because of the nature of their business than is the ordinary corporate citizen.

It is obvious from the Commission's Notice that there is an implicit belief in the Commission that the Commission should get out of the censorship business. Outside of the question of whether the right of free speech should outweigh considerations of exercise of the police power and consequent regulation and close scrutiny of advertising and advertising expense, the issue really becomes a practical one:

> ". . . the desirability of reducing the considerable amount of staff and Commission time now consumed in the detailed scrutiny of advertising, and in hair-splitting determinations where the amount of dollars involved is close to minimal." (Page 9 of the Commission Notice)

Exhibit 3 Appended to Affidavit in Support of Petition of Central Hudson Gas & Electric Corporation

We would urge the Commission to review the latest United States Supreme Court case in the area of commercial speech, *Va. Pharmacy Bd.* v. *Va. Consumer Council,* 48 L Ed 2d 346 (1976). The Court wisely observed at page 363 of that case:

> "There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than close them."

We do ask that a strong and overriding emphasis be given to freedom of speech and that utilities be given every opportunity to operate outside of the present restrictive (by Commission admission) control of the Commission.

The Commission Notice is a sophisticated document which strives hard for objectivity. The arguments pro and con on utility advertising (promotional, institutional and political, or whatever categories one wishes to create) are well known and we do not intend to go into great detail in this statement by adding pro arguments or to amplify and buttress the pro arguments which the Commission mentions. There are, however, two areas which we feel should bear special attention. The first of these is that utilities and, indeed commissions, have a low image in the view of the public. The great problems that have beset the utility industry over the last ten years have received extensive media coverage and those with positions opposed to those of the utilities have received extensive coverage of their views. This has had the practical effect of creating a strong countervailing force to the views of the utilities, and in our opinion, this force has transcended being merely countervailing (which is healthy), but has become almost overwhelming. We are in a practical sense at this point in time in real danger of being overwhelmed by a tyranny of opinion from those opposed to the viewpoints of the industry. Accordingly, there is an imperative

need for a free flow of information from both sides, so that consumers can make informed energy judgments.

The second area involves an understanding of what advertising in a promotional sense is supposed to do and has done with respect to American industry. Advertising in any business is always recognized as a legitimate expense—it has a proven track record of improving profitability and with increased profitability there is always a downward pressure on rates. Increased profitability will inevitably lead to an improved credit rating in the financial marketplace and resultant lower capital costs and consequent downward pressure on rates. Thus, both stockholder and ratepayer benefit. We believe that advertising must be viewed as an integral part of the entire corporate operation of the utility and that making distinctions between stockholder and ratepayer are essentially counterproductive.

Again, we urge the Commission to allow utilities to freely advertise.

Respectfully submitted,

Central Hudson Gas & Electric Corporation

By WILLIAM A. KLING
William A. Kling

Verified Answer of the Public Service Commission of the State of New York

STATE OF NEW YORK
SUPREME COURT—COUNTY OF ALBANY

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Petitioner,

against

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent,

for a judgment pursuant to Article 78 of
the Civil Practice Law and Rules.

Respondent, Public Service Commission of the State of New York answering the petition herein:

1. Admits the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 8, 10, 11 and 12 of said petition.

2. Denies the allegations contained in paragraph 7 of said petition and refers to the Commission's Policy Statement and Order issued February 25, 1977 for the complete and accurate contents thereof.

3. Denies the allegations contained in paragraph 9 of said petition and refers to the petition for rehearing for its complete and accurate contents.

4. Denies the allegations repeated in paragraphs 13, 15 and 19 of said petition which are denied in this Answer.

5. Denies the allegations contained in paragraphs 14, 16, 17, 18, 20 and 21 of said petition.

AS AND FOR A STATEMENT OF THE GROUNDS OF THE ACTION TAKEN BY RESPONDENT PUBLIC SERVICE COMMISSION, SAID RESPONDENT ALLEGES:

6. Petitioner herein seeks to review the Commission actions which relate to (1) restrictions on the use of bill inserts by utility management to disseminate its points of view on controversial matters of public policy; (2) the cost allocation to be made to the company's shareholders for advertising on controversial issues; and (3) a restriction on promotional advertising by electric utilities.

7. The Commission's determinations in the first two items discussed above is a result of decisions in Commission Cases numbered 27036 and 27052. Case 27036 was commenced by Complaint dated May 24, 1976 by Natural Resources Defense Council, *et al.* which complained of a January 1976 bill insert by Consolidated Edison. The bill insert was a reprint of an article discussing the need for the development of nuclear power to meet the nation's energy demand. The complainants requested a ruling from the Commisson seeking redress for the bill insert, prohibiting the company from discussing issues of a political nature in future bill inserts, and the opportunity to submit material for a future bill insert discussing complainants' views concerning nuclear power. A copy of the Complaint and Memorandum of Points and Authorities in Support of Complaint is appended hereto as Exhibit 1. [Exhibit omitted in printing.]

8. After the submission of complainants' Complaint, Consolidated Edison submitted a Memorandum dated June 21, 1976 and a supplement dated July 1, 1976 opposing the relief sought by complaints. In turn, complainants submitted a response to Consolidated Edison's submission. A copy of Consolidated Edison's Complaint and supplement is appended hereto as Exhibit 2. A copy of complainants' response is appended hereto as Exhibit 3. [Exhibits 2 and 3 were omitted in printing.]

9. Based upon its decision in Case 27052, as discussed hereinafter, the Commission by Order dated February 17, 1977 denied the complaint of the Natural Resources Defense Council,

Inc. *et al.*, since that matter had been disposed of within the context of the Commission's decision in Case 27052. A copy of the Commission's Order of February 17, 1977 is appended hereto as Exhibit 4. [Exhibit omitted in printing.]

10. Commission Case No. 27052 was commenced by respondent's Order issued July 28, 1976 issuing a Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices. The Notice discussed the issue of promotional, institutional and informational advertising by utilities. It solicited comments from interested parties by September 13, 1976. A copy of the Commission's July 28, 1976 Notice is appended hereto as Exhibit 5. [Exhibit omitted in printing.]

11. In response to the Commission's Notice, comments were submitted by numerous parties, including petitioner, Central Hudson. A copy of the comments received by the Commission are appended hereto as Exhibit 6. [Exhibit omitted in printing.]

12. After considering the comments of the parties, the Commission on February 25, 1977 issued its Statement of Policy on Advertising and Promotional Practices of Public Utilities. That order reaffirmed a ban on promotional electric advertising first instituted by the Commission on December 5, 1973 and, imposed restrictions on the use of utility bill inserts to promote the view point of management on controversial issues and determined that the cost of utility advertising on matters of public controversy should be borne by the utility shareholders rather than by the ratepayers. A copy of the Commission's Order of December 5, 1973 is appended as Exhibit 1 to the affidavit of Davison W. Grant accompanying the petition herein. A copy of the Commission's Statement and Order of February 25, 1977 are appended to the petition as Exhibits A and B.

Verified Answer of the Public Service Commission of the State of New York

13. Subsequent to the Commission's Order of February 25, 1977, several parties, including petitioner Central Hudson, applied for rehearing of the Commission's Order. Copies of the petitions for rehearing are appended hereto as Exhibit 7, except the Central Hudson petition, which is attached to the petition as Exhibit C. [Exhibit 7 omitted in printing.]

14. By Order issued July 14, 1977, the Commission denied the petitions for rehearing including the petition by petitioner Central Hudson. A copy of the Commission's Order of July 14 is appended to the petition as Exhibit D.

15. Respondent, Public Service Commission's directives in its Cases 27052 and 27036 were made only after full consideration of the positions of all parties to the proceedings. The actions taken by the Commission were in all respects just, reasonable and lawful, and in no respects arbitrary, capricious, or unlawful.

WHEREFORE, respondent demands judgment confirming the Commission's determinations sought to be annulled herein and denying the relief sought by petitioner.

PETER H. SCHIFF

Dated: November 29, 1977

Counsel to the Public Service
Commission of the State of
New York
Empire State Plaza
Albany, New York 12223
(518) 474-2510

[Verification omitted in printing.]

Judgment of the New York Supreme Court, Albany County

At a Special Term, Part I, of the Supreme Court held in and for the County of Albany, at the County Courthouse in the City of Albany, New York on the 9th day of December, 1977.

Index No. 11317-77

Present:

HON. ROGER J. MINER,
Justice.

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Petitioner,

— against —

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent,

For a judgment pursuant to Article 78 of the Civil Practice Law and Rules.

The petitioner, having brought this proceeding, by service of a notice of petition and petition dated and verified November 4, 1977 upon the respondent Public Service Commission of the State of New York for a judgment, pursuant to Article 78 of the Civil Practice Law and Rules, annulling an order and policy statement of respondent Public Service Commission prohibiting advertisements which promote the use of electric energy, the use of bill inserts as a means to disseminate petitioner's position on matters of public controversy and establishing a policy of disallowing for ratemaking purposes the costs of political advertising.

NOW, on reading the notice of petition and petition dated and verified November 4, 1977, and the answer of respondent Public Service Commission verified November 29, 1977 and Exhibits 1 through 6 annexed thereto, and the reply dated De-

cember 6, 1977, and after hearing Davison W. Grant, Esq., attorney for petitioner, in support of the petition, and Howard J. Read, Esq., attorney for respondent, in opposition thereto, and due deliberation having been had, and upon reading and filing the decision of this Court dated the 17th day of February, 1978, and on motion of Peter H. Schiff, Esq., attorney for respondent, it is

ADJUDGED that respondent's directive prohibiting the use of bill inserts as a means to disseminate petitioner's position on matters of public controversy is annulled, and it is

FURTHER ADJUDGED that the said petition in all other respects be and the same hereby is dismissed.

Dated: March 9, 1978
Hudson, N. Y.

ENTER:

ROGER J. MINER

J. S. C.

Order of the New York Supreme Court, Appellate Division, Third Judicial Department

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 19th day of June, 1978.

Present:

HON. A. FRANKLIN MAHONEY,
Presiding Justice,

HON. LOUIS M. GREENBLOTT,
HON. MICHAEL E. SWEENEY,
HON. ROBERT G. MAIN,
HON. ANN T. MIKOLL,
Associate Justices.

County Clerk's Index No. 11317-77

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Petitioner-Respondent,

— against —

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent-Appellant,

For a judgment pursuant to Article 78 of the Civil Practice Law and Rules.

The appellant Public Service Commission of the State of New York having appealed from a judgment of the Supreme Court of Albany County, entered on the 14th day of March, 1978, in the office of the clerk of the County of Albany, and said appeal having been presented during the above-stated term of this Court, and having been argued by Howard J. Read, Esq., of counsel for appellant, and by Davison W. Grant, Esq., of counsel for re-

Order of the New York Supreme Court,
Appellate Division, Third Judicial Department

spondent, and, after due deliberation, the Court having rendered a decision on the 27th day of July, 1978, Justices Sweeney and Main dissenting in part, it is hereby

ORDERED that the judgment entered March 14, 1978 be and hereby is modified, on the law, be deleting so much thereof as annulled the PSC's directive; determination confirmed and, as so modified, affirmed, without costs.

ENTER:

/s/ JOHN J. O'BRIEN
Clerk

DATED AND ENTERED: August 2, 1978.
A TRUE COPY:
JOHN J. O'BRIEN
Clerk

Supreme Court, U. S.
FILED
NOV 1 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT BELOW

PETER H. SCHIFF
General Counsel

HOWARD J. READ
Assistant General Counsel
Public Service Commission
of the State of New York
Empire State Plaza
Albany, New York 12223
Tel. No. (518) 474-2510

Attorneys for Appellee,
Public Service Commission
of the State of New York

October, 1979

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
20 CENTER ST., BATAVIA, N. Y. 14020
(716) 344-2000

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

On Appeal From the Court of Appeals of the State of New York.

MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT BELOW

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves: (1) that this appeal be dismissed, on the ground that it does not present a substantial federal question; or (2) that the judgment of the New York State Court of Appeals sought to be appealed from be affirmed.

Statement

1. Introduction.

This case involves an appeal from a judgment (App. 74a-75a)[1] of the Court of Appeals of the State of New York. The Court upheld an order of Appellee Public Service Commission of the State of New York (Commission) banning promotional advertising by New York State electric utilities subject to the Commission's jurisdiction.

The Commission's order accompanied its Statement of Policy on Advertising and Promotional Practices of Public Utilities dated February 25, 1977 (App. 32a-55a). It continued a prohibition on promotional advertising imposed in the wake of the 1973 Arab oil embargo. The order was challenged by Central Hudson Gas & Electric Corporation (Central Hudson) in a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules. The Commission's directive was affirmed by the New York Supreme Court (App. 22a-24a), the Appellate Division of State Supreme Court, Third Department (App. 15a-21a), and finally, the New York Court of Appeals (App. 25a-31a).[2]

---

[1] References to App. .... are to pages in Appellant's Appendix to Jurisdictional Statement.

[2] A parallel proceeding challenging the Commission's order was brought by Long Island Lighting Company in the United States District Court for the Eastern District of New York. Judge Pratt granted Long Island Lighting Company a judgment declaring that the Commission's advertising policy statement and subsequent implementing orders: ". . . to the extent that they prohibit plaintiff LONG ISLAND LIGHTING COMPANY (LILCO) from truthful promotional advertising of electric space heating, violates the First Amendment and are, therefore, unconstitutional . . ." He enjoined the Commission from enforcing its prohibition but stayed his order pending consideration of the case by the United States Court of Appeals for the Second Circuit. Portions of Judge Pratt's opinion dealing with promotional advertising are included at App. 88a-97a. Motions to consolidate the Long Island Lighting Company case with the instant case, and *Consolidated Edison Company of New York, Inc. v. Public Service Commission of the State of New York* (79-134) have been filed on behalf of Long Island Lighting Company (79-629) and Scientists' Institute for Public Information, *et al.* (79-595).

The Central Hudson case was determined in the State courts concurrently with another proceeding, *Consolidated Edison Company of New York, Inc. v. Public Service Commission of the State of New York.* That case involved a challenge to another portion of the Commission's Advertising Policy Statement—a prohibition on the use of bill inserts by utilities to espouse the position of utility management on controversial matters of public policy. This Court has noted probable jurisdiction (No. 79-134, October 1, 1979) of an appeal by Consolidated Edison from a decision of the New York Court of Appeals, upholding the Commission's order 47 N.Y.2d 94 (1979). The Consolidated Edison case and this case which is concerned solely with promotional advertising involve substantially different issues. In our view, the noting of probable jurisdiction in *Consolidated Edison* provides no basis for accepting the appeal here.

2. The Factual Background.

The Commission's February 25, 1977 policy statement was issued at the culmination of its investigation into advertising practices by New York State utilities. During the investigation, the Commission considered, *inter alia,* whether it should alter its 1973 ban on promotional advertising by electric utilities (App. 25a-31a). No party advocated permitting general promotion of electricity and the Commission did not find persuasive the contention that its ban should, however, be relaxed to allow advertisement of off-peak loads (including electric space heating). The Commission stated (App. 36a-37a):

> We recognize now, as the Commission did in 1972, that development of off-peak loads may be beneficial in numerous ways. Increased off-peak generation, however, while conferring some beneficial side effects, also con-

> sumes valuable energy resources and, if it is the result of increased sales, necessarily creates incremental air pollution and thermal discharges to waterways. More important, any increase in off-peak generation from most of the major companies producing electricity in this State would not, at this time, be produced from coal or nuclear resources, but would require the use of oil-fired generating facilities. The increased requirement for fuel oil to serve the incremental off-peak load created by promotional advertising would aggravate the nation's already unacceptably high level of dependence on foreign sources of supply and would, in addition, frustrate rather than encourage conservation efforts. We realize, too, that a continued ban on promotion of off-peak electric usage may aptly be described as piecemeal conservationism since promotion of oil for use in heating or internal combustion applications is not similarly proscribed. Nevertheless, conservation of energy resources remains our highest priority. We do not consider it inconsistent with that principle to implement programs that admittedly will be less than optimally effective, in a national context. It is reasonable to believe that a continued proscription of promotion of electric sales will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales.

The Commission did state that it would allow advertising if the "preponderant" purpose was to shift load from peak to off-peak (App. 37a). In addition, the Commission stated that it would be prepared to reconsider its ban from time to time if conditions change sufficiently to warrant it (App. 38a).

Several parties petitioned for reconsideration of the Commission's order. When denying the petitions, the Commission specifically considered the free speech First Amendment con-

sequences of its order in response to a contention by Central Hudson that its right of free speech was abridged (App. 57a-58a):

> Central Hudson excepts to our decision to continue the existing prohibition of promotional advertising by both electric and gas companies. The utility contends that under *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), commercial speech is protected by the guarantees of the Bill of Rights and, therefore, our restriction on promotional advertising is void.
>
> * * *
>
> In *Virginia State Board of Pharmacy*, the Court could find no legitimate State interest in restricting the dissemination of pricing information to the public. A much different situation exists here. The rates of electric utilities in this State continue to rise. The need for such increases derives in substantial part from pressures for increasing plant capacity to meeting growing demand. While some progress is being made to price electricity to meet its marginal cost, it is clear that the rates charged today do not cover the marginal costs of new capacity. In these circumstances, promotion of electric usage by electric utilities will simply exacerbate the pressure for spiraling prices. Moreover, when national policy requires energy conservation, the promotion of electricity by regulated public utilities provides totally misleading signals that conservation is unnecessary. This is especially true since the utilities in this State are expected to promote conservation by their customers.
>
> While promotion of off-peak usage, particularly electric space heating, is touted by some as desirable because it might increase off-peak usage and thereby improve a summer-peaking company's load factor, we are convinced that off-peak promotion, especially in the context of imperfectly structured electric rates, is inconsistent

with the public interest,[1] even if it could be divorced in the public mind from promoting electric usage generally. As we pointed out in our Policy Statement, increases in generation, even off-peak generation, at this time, requires the burning of scarce oil resources.[2] This increased requirement for fuel oil aggravates the nation's already high level of dependence on foreign sources of supply.

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[1] Advertisements encouraging installation of heating equipment will frequently occur during the summer periods when air-conditioning usage is at its peak and when requests for conservation are being made.

[2] We distinguish here between promotional advertising designed to shift existing consumption from peak to off-peak hours and advertising designed to promote additional consumption during off-peak hours. It is the latter that we proscribe here.

An additional area of legitimate State interest was pointed out by Chairman Kahn in his separate statement. The uncontrolled promotion of electric heating most likely means the installation of heat pumps, since they are the most promising mechanism for offsetting the relative inefficiency of converting fossil fuels into electricity; but installation of a heat pump means also installation of central air-conditioning. To this extent, promotion of off-peak electric space heating involves promotion of on-peak summer air-conditioning as well as on-peak usage of electricity for water heating. And the price of electricity to most consumers in the State does not now fully reflect the much higher marginal costs of on-peak consumption in summer peaking markets. In these circumstances, there would be a subsidization of consumption on-peak, and consequently, higher rates for all consumers. The promotion of electric consumption at rates that do not reflect the costs of it to society is not the kind of commercial speech contemplated by *Virginia Board of Pharmacy*.

Finally, the Commission concluded (App. 59a):

> It is clear, therefore, that there are ample grounds here for regulation of commercial speech. Manufacturers and dealers, whom we do not regulate, remain free to promote the use of electric equipment and appliances. Such advertising will not provide the same misleading signals to the public and at the same time will provide a means for the public to be advised of the available alternatives.

3. The Decision Appealed From.

In considering Central Hudson's attack on the Commission's ban, the New York Court of Appeals rejected Central Hudson's contention that the Commission lacks statutory authority to impose its ban and that the ban violated Central Hudson's constitutional right to Freedom of Speech and Equal Protection (App. 2a-14a). The court found clear authority for the Commission under the New York State Public Service Law Sections 4, 5, 65 and 66. It noted the imperative need for a utility subject to the Commission's jurisdiction to act in a reasonable manner that will conserve resources of the state and nation (App. 4a-5a). The Court further found that the ban did not abridge Central Hudson's constitutional rights, citing the lower level of protection for commercial speech enunciated by this Court in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (App. 10a). It found that utilities supply energy in a monopoly context making information customers might receive from promotional advertising by utilities of little value since service standards and rates are set by the Commission (App. 12a-13a). The Court concluded (App. 13a-14a):

> Indeed, promotional advertising is not at all concerned with furnishing information as to the "availability, nature, and price" of electrical service. It seeks, instead,

> to encourage the increased consumption of electricity, whether during peak hours or off-peak hours. Thus, not only does such communication lack any beneficial and informative content, but may be affirmatively detrimental to the society. It would not strain the bounds of judicial notice for use to take cognizance of the present energy crisis. Conserving diminishing resources is a matter of state concern and increased use of electricity is inimicable to our interests. Promotional advertising, if permitted, would only serve to exacerbate the crisis. In short, this constitutes a compelling justification for the ban.

Central Hudson thereupon brought this appeal (App. 76a-77a).

ARGUMENT

I. The Commission's prohibition of promotional advertising is consistent with First Amendment requirements as delineated by this Court.

This case involves commercial speech (Central Hudson desires to advertise to sell more electricity). The Commission's ban must therefore be seen in light of the applicable constitutional standard enunciated by this Court when it recently extended First Amendment protection to commercial speech. The Court has considered commercial speech in a number of contexts, including: *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (pharmacists); *Bigelow v. Virginia*, 421 U.S. 806 (1975) (abortion services); *Linmark Associates, Inc. v. Town of Willingboro*, 431 U.S. 85 (1977) (residential real estate transactions); *Carey v. Population Services International*, 431 U.S.

678 (1977) (contraceptives); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (legal services); *Friedman v. Rogers*, ... U.S. ...., 47 U.S.L.W. 4151 (February 20, 1979) (use of trade names) and *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (solicitation of legal services). In addition, the Court has also considered First Amendment rights of corporations in the political arena in *First National Bank of Boston v. Bellotti*, 435 U.S. 763 (1978). In the cases, where it has struck down prohibitions on advertising, and in *Bellotti*, the determination has been accompanied by a finding that the bans were not ~~wanted~~ warranted by the state interests purported to be achieved. This Court has been careful, however, when extending First Amendment protection to commercial free speech to recognize that where important governmental interests are served by advertising bans that the prohibitions would be permitted. The Court has carefully noted that the interests purported to be served when free speech rights are abridged in the commercial context must be weighed against the rights of the speaker and the public to give and receive information. From *Virginia State Board of Pharmacy to Bates* to *Ohralik*, it has noted differences between commercial speech and other kinds. This Court's most complete enunciation of its position on the special nature of commercial speech came in *Ohralik* where it stated (436 U.S. at 455-456 (1978)):

> Expression concerning purely commercial transactions has come within the ambit of the Amendment's protection only recently.[12] In rejecting the notion that such speech "is wholly outside the protection of the First Amendment," *Virginia Pharmacy, supra*, at 761, we were

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[12] See *Valentine v. Chrestensen*, 316 U.S. 52 (1942); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976).

> careful not to hold "that it is wholly undifferentiable from other forms" of speech. 425 U.S., at 771 n. 24. We have not discarded the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ibid.* To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

The Court further explained the relationship between the First Amendment and government regulation[3] (436 U.S. at 456):

> Moreover, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (CA2 1968), cert. denied, 394 U.S. 976 (1969), corporate proxy statements, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the exchange of price and production information

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[3] The Court in *Ohralik*, thus reaffirmed the "two tier" theory of speech first formulated in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

among competitors, *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921), and employers' threats of retaliation for the labor activities of employees, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61-62 (1973). Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. Neither *Virginia Pharmacy* nor *Bates* purported to cast doubt on the permissibility of these kinds of commercial regulation.

The New York Court of Appeals was fully justified in following this Court's decisions when it upheld the Commission's ban on promotional advertising by electric utilities. The ban is absolutely necessary to carry out a valid state regulatory scheme that assures conservation of foreign fuel oil, the lowest possible rates to electric utility customers and general conservation of electric usage. Accordingly, this appeal raises no substantial constitutional question requiring resolution by this Court.

II. The Court below correctly determined that in New York State, paramount state interests justified the Commission's promotional advertising ban.

A.

Central Hudson argues (Jurisdictional Statement, pp. 10-14) that its promotional advertising, although done by a regulated monopoly, is constitutionally protected because it must compete for some sales with other entitites. It thereby attempts to bring its case under the penumbra of *Virginia Pharmacy* and succeeding cases that were decided in the context of a competitive marketplace. Its argument ignores the basis for the Commission's advertising ban and is without merit.

The utility's operations, including prices and service standards, are subject to complete and absolute control of the Commission (New York Public Service Law § § 65, 66). The company may offer no customer any price or service that is not subject to filed tariff provisions. No sales, discounts or bonuses are permissible under New York Law. On the other hand, a customer living in Central Hudson's service territory may purchase electricity only from Central Hudson. All residents of the service territory, therefore, must bear the cost and other consequences of Central Hudson's promotional advertising. The Commission found that promotional advertising would have an adverse impact on the utility's customers because it will increase rates, use more costly foreign fuel oil and cause environmental degradation because of increased generation. (These important State interests which form the basis for the Commission's ban are discussed, *infra.*)

All that Central Hudson is able to show this Court is that if it can advertise, customers in its service area will have more information about which form of space heating to use—oil, gas or electric. Since Central Hudson sells the latter two, the company's argument concerning advertising is reduced to whether it should be allowed to promote electric heat so that it may compete with oil heat dealers in the marketing arena.[4]

Central Hudson is clearly wrong, as a general matter, when it argues (Jurisdictional Statement, p. 13) that there is intense competition between oil and electricity and gas in the market

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[4] Central Hudson's argument assumes that heating oil dealers are actively advertising for new customers, an assumption not supported by oil dealer difficulties in obtaining fuel supplies to service existing accounts.

for space and water heating. Except for those homeowners who desire to replace existing heating systems and new homes, the vast bulk of Central Hudson's customers have homes with one mode of heat installed when the home is built. Heating systems are not like new cars where a customer will buy a new one every few years.[5]

Even accepting Central Hudson's argument that allowing promotion will increase available information about space heating, there is but a small benefit from promotional advertising—the possibility of providing information to a select few who may be making decisions about the type of heat or water heating to install. This meager benefit must be weighed against the important, countervailing State interests sought to be furthered by the Commission's promotional advertising ban designed to be of benefit to all of the utility's customers.

B.

Central Hudson (Jurisdictional Statement, pp. 14-16) barely addresses the State interests underlying the Commission's ban. Since this Court has stressed the importance of State interests in its commercial free speech decisions, we must deal with the matter in somewhat more detail.

The New York Court of Appeals, in upholding the Commission's order, relied mainly upon the undisputed need to

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[5] The choice of heating system in new homes is usually made by the builders before the home is offered to the public. Home builders (and anyone else) are free to talk to Central Hudson or receive promotional information from heating and appliance dealers about costs and benefits of electric heat.

conserve fuel oil (App. 13a-14a). Central Hudson's criticism of this finding is not that the goal is unimportant but that the Commission's ban on promotional advertising will not do much good. It argues that New York is the only state imposing an advertising ban and that advertising has not been banned by the federal government. We fail to understand why this means that a ban on promotional advertising in New York is constitutionally infirm or otherwise misguided.

The Commission found (App. 37a) that increased generation as a result of promotional advertising ". . . would aggravate the nation's already unacceptably high level of dependence on foreign sources of [oil] supply and would, in addition, frustrate rather than encourage conservation efforts. . . ." This finding is both reasonable and unassailable from a practical standpoint. New York's utilities are required to encourage conservation by their customers. In Central Hudson's case, 775 megawatts of its 820 megawatt capacity are oil fired.[6] Because oil-fired generation is the most expensive and therefore the last to be put on line, each addititional kilowatt hour consumed in New York means that more fuel oil (mostly imported from foreign countries) will be burned.[7]

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[6] Report of Member Electric Systems of the New York Power Pool 1978, (Vol. 1, p. 343).

[7] Central Hudson argues (Jurisdictional Statement, p. 15) that the Commission made but a "faintly affirmative" claim that its advertising ban would promote conservation. If the company had read further it might not have found the claim so "faint". The Commission stated (App. 37a) ". . . conservation of energy resources remains our highest priority. We do not consider it inconsistent with that principle to implement programs that admittedly will be less than optimally effective, in a national context. It is reasonable to believe that a continued proscription of promotion of electric sales will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales."

In order to reduce electric usage, New York's utilities are required, in accordance with the New York Public Service Law, to encourage conservation by their customers (§ 5(2)). Central Hudson, which does not dispute the desirability of conservation (Jurisdictional Statement, p. 15) would nevertheless undercut conservation efforts by promotion of electricity (App. 58a).

Title II of the National Energy Conservation Policy Act of 1978 directs the implementation of utility programs to foster and encourage residential energy conservation. The Commission noted (App. 58a) that advertisements encouraging installation of heating equipment will frequently occur during summer periods at times of peak load when requests for conservation are being made. Promotional advertising at these times by electric utilities would have the effect of telling consumers, whom they are supposed to be encouraging to use less electricity, that they should install equipment which will use more electricity. The problem with misleading messages can be avoided, as the Commission noted (App. 58a), by advertisements on behalf of manufacturers and dealers of electric appliances who remain free to promote the use of these devices. Such advertising will provide a means for the public to be advised of possible alternatives. In addition, of course, utilities remain free to provide advice to customers if they request it. The Commission's restriction relates only to direct promotional advertising by the utility itself.

The Commission's determination is in accord with both national and State law which recognize the paramount need to foster conservation and lessen dependence on foreign fuel oil. Recently passed national energy legislation, the National Energy Conservation Policy Act, Section 102 states:

> The Congress finds that (1) the United States faces an energy shortage arising from increasing demand for

> energy, particularly for oil and natural gas, and insufficient domestic supplies of oil and natural gas to satisfy that demand; . . .

The New York State Legislature has made a similar finding when enacting Article VII-A of the Public Service Law establishing utility home insulation and conservation projects (McKinney's Consolidated Laws of New York, Book 47, Pocket Part, p. 101):

> . . . In the state of New York, which consumes, to an overwhelming degree, far more energy than it produces, the need for energy conservation is of particular importance.

In addition to its conservation finding, the Commission made additional determinations which also justify its ban on the promotion of electricity.[8] The Commission found (App. 57a) that promotional advertising of electric service at the present time will have a detrimental impact on utility rates and service. The Commission determined that promotion of electricity would increase the cost of providing electric service, and increase adverse environmental impact as a result of additional generation. One of the Commission's primary concerns, explained in detail on rehearing is related to the impact on electric rates for all customers of utilities if utilities are allowed to advertise. As the Commission stated (App. 57a):

> . . . The rates of electric utilities in this State continue to rise. The need for such increases derives in substantial part from pressures for increasing plant capacity to meet-

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[8] Central Hudson addresses the additional concerns in a footnote (Jurisdictional Statement, p. 14) showing its utter disregard for the New York regulatory process which seeks to assure reasonable electric rates and responsible operation of electric facilities.

> ing growing demand. While some progress is being made to price electricity to meet its marginal cost, it is clear that the rates charged today do not cover the marginal costs of new capacity. In these circumstances, promotion of electric usage by electric utilities will simply exacerbate the pressure for spiraling prices . . . .

The rate problem discussed by the Commission is that utilities in New York State experience different costs of producing electricity at different times of day and year. The Commission has experienced many difficulties in attempting the first steps of establishing rates that reflect varying costs and charging those rates to the customers responsible for their creation. *See, New York State Council of Retail Merchants v. Public Service Commission*, 45 N.Y.2d 661 (1978). At the present time, New York utilities do not, except in isolated instances, have rates that adequately reflect marginal cost differences and do not have economically practical time-of-day metering equipment that can measure fluctuations in usage for most customers.

Utilities are, therefore, unable to charge their customers actual costs but must charge an average cost basis. This means that electricity cannot be priced in an economically efficient manner that maximizes the use of society's resources. It also means that peak loads are underpriced and therefore encouraged. Underpricing of peak loads leads in turn, to the need for new, costly generating facilities. In other words, existing utility rate structures send incorrect price signals to consumers. If some consumers cause increased peak load, all customers will be required to bear a portion of the increased cost burden. The Commission is in the initial steps of attempting to structure electric rates so that customers pay the full

cost of service depending upon the time at which electricity is consumed. The Commission has announced (App. 38a) its intention to review its ban on promotional advertising at such time as the problems presented by an inadequate utility rate design no longer exist.[9]

The Commission also found (App. 62a) that general stimulation of demand through promotional advertising will require the use of more foreign oil by utilities in New York State. In addition, increased electric generation will also be accompanied by increased environmental impacts resulting from atmospheric and thermal discharges which accompany the increased usage of electric facilities.

The Commission's ban, thus, deals with important State interests including conservation and rate stability. Promotion of electricity will, as the Commission found, frustrate conservation efforts and force electric rates upward. These important State interests fully justify the Commission's ban on promotional advertising. There is simply no other way to accomplish these objectives.

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[9] The Commission has been engaged for the last several years in developing more sophisticated rate structures. In its Case 26806—*Proceeding on Motion of the Commission as to Rate Design for Electric Corporations*, the Commission has compiled a record upon which to take initial steps to institute time-of-day pricing; however, sufficient data has not yet been accumulated nor have metering practices been developed to institute rate structures which reflect, except in limited situations, the variations in cost of providing electric service. Central Hudson's argument (Jurisdictional Statement, P. 14, footnote) that the Commission can use its rate power to solve the problem created by promotion simply ignores the reality of the state of the art in rate design. If a utility does not provide proper economically efficient rates, or supply the data that permits such rates to be fixed, it has no basis for complaining that the regulatory commission has not fixed proper rates.

III. The Commission's order and the Public Service Law are clear and precise.

Central Hudson argues (Jurisdictional Statement, pp. 16-21) that the Public Service Law as applied in this case by the New York Court of Appeals is unconstitutional because the Legislature has not provided adequate standards for Commission action to restrict speech by public utilities. The company further argues that the Commission's order is vague and overbroad. Neither contention is correct nor raised in a timely manner. The claims were not raised below[10] and may not be raised for the first time in this Court. This Court has repeatedly held that it will not exercise jurisdiction to consider federal questions presented for the first time in a jurisdictional statement pursuant to 28 U.S.C. 1257(c). *Cardinale v. Louisiana*, 394 U.S. 437 (1959); *Safeway Stores, Inc. v. Oklahoma Retail Grocers*, 360 U.S. 334 at 342 n. 7 (1969); *Herndon v. Georgia*, 295 U.S. 441 (1935); and *Crowell v. Randell*, 10 Pet. 368 (1836). In any event, the claims are without merit.

The New York Court of Appeals did determine that the Commission had statutory authority to restrict promotional advertising (App. 3a-5a). It did so after reviewing the "vast power" conferred upon the Commission by the Legislature. Central Hudson correctly notes that the Court of Appeals' determination in this regard is not a matter reviewable in this Court.

Nevertheless, it seeks to attack the Court of Appeals' decision by arguing that there are no standards in the law sufficient to allow the Commission to restrict the utility's speech. The law, however, contains specific directives (1) that the Commission encourage utilities to act so that they will

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[10] See Central Hudson's petition to the New York Supreme Court (App. 68a-73a).

preserve environmental values and conserve natural resources (Public Service Law § 5(2)), and (2) that the Commission require acts and practices as "will best promote the public interest" (Public Service Law § 66(2)). Further, all utilities are required to provide "safe and adequate service" at "just and reasonable rates" (Public Service Law § 65).

The Commission's order clearly fulfills these objectives and the Court of Appeals so found. The legislative standards followed by the Commission are more than adequate to pass constitutional muster, not only for economic regulation, but also for orders restricting promotional advertising in the context of regulating utility conduct. While the Public Service Law is not a statute designed to regulate speech, it is a statute designed to assure that utilities follow practices that are in the public interest.

This Court has held that speech may be controlled in the context of a general regulatory scheme. *Arnett v. Kennedy*, 416 U.S. 134 (1974). There an employee was dismissed from the Office of Economic Opportunity for violating 5 U.S.C. § 7501(a) authorizing removal for "such cause as will promote the efficiency of the service". Even though the statute did not mention speech, the employee's statements were the cause for his dismissal. This Court rejected appellee's argument that the standard abridged his freedom of expression. Similarly, in this case there was no need for the Legislature to specifically detail the measures that the Commission may use to accomplish valid regulatory goals.[11]

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[11] Central Hudson also argues (Jurisdictional Statement, p. 19) that the Court of Appeals did nothing to narrow the circumstances under which it might find an order restricting speech to be invalid. As we have discussed in Point II, *supra*, there are several important state interests which justify the Commission's order. There was no need for the Court of Appeals to reject any of the grounds set forth by the Commission since they are all valid reasons for an advertising ban.

Central Hudson next attacks the Commission's order on grounds of vagueness and overbreadth; however, the order is neither vague nor overbroad. It provides (App. 31a): "[a]ll electric corporations are hereby prohibited from promoting the use of electricity through the use of advertising, subsidy payments not committed prior to the date of this order, or employee incentives." The order is not one that "men of common intelligence must necessarily guess at its meaning." *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973), quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). In *Broadrick* this Court rejected a vagueness challenge to a statute that provided adequate warning of proscribed activities.

Central Hudson knows precisely what it must do—it must not engage in promoting the use of electricity. If it has any doubt as to the meaning of the term, it need only consult the dictionary. Further, the order does not allow the Commission to "pursue [its] personal predilections" as was the case in *Smith v. Goguen*, 415 U.S. 566 (1974) (cited by Central Hudson (Jurisdictional Statement, p. 19)), nor does it create a regulatory maze as was the case in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (cited by Central Hudson (Jurisdictional Statement, p. 19)). The wording and intent of the Commission's order are plain.

Central Hudson's argument that the Commission's order is overbroad is apparently not related to traditional concepts of overbreadth frequently discussed by this Court, *e.g.*, *Broadrick, supra.* Rather, it argues that the Commission prohibits promotion of all electric usage, not just space heating. The Commission's order does apply to all promotion because it is promotion generally that flies in the face of the state interests sought to be achieved by the order. The order is not overbroad but rather carefully designed to assure that electric usage not be stimulated by utility advertising.

IV. The Commission's order does not deprive Central Hudson of equal protection.

Central Hudson's final argument (Jurisdictional Statement, pp. 21-24) is that because electric promotion is prohibited and oil dealers remain free to advertise, it has been deprived of equal protection. The argument lacks merit because the Commission, whose jurisdiction extends only to electric utilities, has acted in accordance with its statutory authority to protect utility customers from the adverse effects of promotion of electric usage. The Court of Appeals found the Commission's order to be properly related to valid governmental interests.

Oil dealers have not been singled out for special treatment. There has been no attempt on the part of the State to unconstitutionally favor one party over another. The fuel oil industry, which involves intense competition among dealers in the same area, is quite unlike the monopoly situation enjoyed by Central Hudson.[12] Fuel oil dealers, unlike utilities, are not required to advertise conservation measures. They are not in the position of promoting conservation at the same time they are urging use of their product.[13]

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[12] Central Hudson's monopoly is the reason why its business must be extensively regulated in the public interest by the Commission in accordance with the state interests discussed in Point II, *supra*.

[13] Even though the Commission has restricted utilities from promotional advertising, it has not prohibited advertising by others, including appliance dealers and manufacturers of electric space heating equipment. Advertisement of electric space heat *per se* has therefore not been precluded by the State since entities other than utilities remain free to promote it.

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972), cited by Central Hudson (Jurisdictional Statement, p. 23) does not address a situation similar to the case at hand. There Chicago had placed in a favored status one form of picketing (labor), while banning all other kinds. Here, the Commission's ban on promotion of electricity, while encompassing electric space heat, has no bearing on what proponents of oil heat may or may not do, or for that matter, what electric contractors or appliance dealers may do.

Conclusion

For the above reasons, this appeal should be dismissed or the decision of the New York Court of Appeals summarily affirmed.

Respectfully submitted,

PETER H. SCHIFF,
General Counsel,

HOWARD J. READ,
Assistant General Counsel,

Public Service Commission of
the State of New York,
Empire State Plaza,
Albany, New York 12223,
Tel. No. (518) 474-2510,
Attorneys for Appellee,
Public Service Commission of
the State of New York.

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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT BELOW

TELFORD TAYLOR
60 E. 42nd Street
New York, New York 10017
Tel. (212) 661-0930
Counsel for Appellant

Of Counsel:

WALTER A. BOSSERT, JR.
DAVISON W. GRANT
GOULD & WILKIE
One Wall Street
New York, New York 10005
Tel. (212) 344-5680

TAYLOR, FERENCZ & SIMON
60 E. 42nd Street
New York, New York 10017
Tel. (212) 661-0930

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT BELOW

In its Motion to Dismiss Appeal or Affirm Judgment Below ("Motion"), the Public Service Commission of the State of New York ("Commission") has made two factual assertions which are erroneous and require correction.

1. On page 3 of its Motion, the Commission states that in the proceeding before it "[n]o party advocated permitting general promotion of electricity." This statement is incorrect; the Commission appears to be confused between what appellant should be free to do and what it proposes to do if the ban on promotional advertising is lifted.

Several parties, including Central Hudson Gas & Electric Corporation ("Central Hudson"), (R.* 604-606), the New York Broadcasters Association (R. 481-489), Rochester Gas

* References to "R. " are to pages in the record before the New York State Court of Appeals.

& Electric Corporation (R. 524-537), Niagara Mohawk Power Corporation (R. 539-547), Long Island Lighting Company (R. 548-597), New York State Electric & Gas Corporation (R. 607-608) and the American Association of Advertising Agencies, Inc. (R. 627-639), challenged the ban on promotional advertising and requested that it be lifted in its entirety. These parties asserted that, in the absence of evidence of deception, illegality or inability to furnish service, the Commission was constitutionally foreclosed from prohibiting promotional advertising.

Assuming the Commission's ban is lifted, Central Hudson will be entitled to engage in truthful advertising, unfettered by Commission interference. However, as was made plain to the Commission below (e.g. R. 84-87), Central Hudson does not intend to promote consumption of electric energy merely for consumption's own sake. Were the Commission's ban to be invalidated, Central Hudson would intend to exercise its right to advertise by providing the public with information on specific, new or innovative uses of electric energy or methods of replacing other forms of energy with efficient applications of electric energy. Electric utilities in New York State have demonstrated responsibility and due regard for the public interest when engaging in promotional advertising. A fact acknowledged by the Commission when, a year prior to the initial imposition of the promotional advertising ban, it cited the "appropriate self-restraint in relation to promotional advertising" of electric utilities (*Statement of Policy on Advertising and Promotional Practices by Public Utilities,* 12 NY PSC 108R, 110R (1972)) in finding no need for a ban.

2. On page 19 of its Motion, the Commission contends that Central Hudson's arguments concerning the invalidity of the Public Service Law and the Commission's order for lack of adequate statutory standards, overbreadth and vagueness are not properly before this Court because they were not raised below. There is absolutely no basis for this contention.

As the Commission well knows, Central Hudson raised these arguments below. The question of the overbreadth of the Commission's order was specifically raised in Central Hudson's Brief (pp. 36-37) to the Court of Appeals. Prior to the decision of the Court of Appeals, Central Hudson argued that the Public Service Law could not be construed to grant the Commission the authority to regulate advertising and pointed out (Brief p. 17, Reply Brief pp. 2-3) that if the court construed the Public Service Law to confer such authority on the Commission serious constitutional questions would be raised by such a construction. After the Court of Appeals issued its opinion, which found implied authority for the Commission to regulate advertising in the Public Service Law, Central Hudson filed a motion for rehearing, drawing that court's attention to the defects inherent in such a construction because of the lack of adequate standards for the regulation of speech contained in the Public Service Law. In its response (pp. 4-5) to Central Hudson's motion for rehearing, the Commission specifically addressed this issue.

In any event, the arguments of lack of adequate statutory standards, overbreadth and void for vagueness fall within the rule enunciated by the Court in *Dewey* v. *Des Moines,* 173 US 193, 198: "Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." Also see *Raley* v. *Ohio,* 360 US 423,426-427; the New York Court of Appeals also follows this rule. *People* v. *De Bour,* 40 NY 2d 210, 215, 386 NYS 2d 375 (1976).

Central Hudson's petition to the New York courts clearly challenged the validity of the Commission's order under the First and Fourteenth Amendments of the United States Constitution (App. 70a). Each of the opinions of the lower courts explicitly considered the question of the validity of the order under the First Amendment. A challenge to the validity of a state statute under the First Amendment subsumes the subsidiary questions of lack of adequate standards, overbreadth and void for vagueness.

Conclusion

The existance of a substantial Federal question which merits consideration by the Court has been demonstrated; accordingly, the Motion to Dismiss or Affirm should be denied.

Respectfully submitted,

TELFORD TAYLOR
60 E. 42nd Street
New York, New York 10017
Tel. (212) 661-0930
Counsel for Appellant

Of Counsel:

WALTER A. BOSSERT, JR.
DAVISON W. GRANT
GOULD & WILKIE
One Wall Street
New York, New York 10005
Tel. (212) 344-5680

TAYLOR, FERENCZ & SIMON
60 E. 42nd Street
New York, New York 10017
Tel. (212) 661-0930

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BRIEF FOR APPELLANT

TELFORD TAYLOR
60 E. 42nd Street
New York, New York 10017
Tel. (212) 661-0930
Counsel for Appellant

Of Counsel:
WALTER A. BOSSERT, JR.
DAVISON W. GRANT
GOULD & WILKIE
One Wall Street
New York, New York 10005
Tel. (212) 344-5680

TAYLOR, FERENCZ & SIMON
60 E. 42nd Street
New York, New York 10017
Tel. (212) 661-0930

January, 1979

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v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

Central Hudson Gas and Electric Corporation, appellant, appeals from the final judgment of the Court of Appeals of the State of New York, entered July 9, 1979, denying rehearing of a judgment entered May 1, 1979 which affirmed judgments of the Appellate Division, Third Department, and the New York Supreme Court, Albany County, and upheld the federal constitutionality of the Public Service Law of New York State as construed and applied by the Public Service Commission of the State of New York in its orders of February 25, 1977 and July 14, 1977 prohibiting electric utility companies subject to the Commission's jurisdiction from promoting the use of electrical energy by advertising. These orders are contemporaneous with the order challenged in *Consolidated Edison Co.* v. *Public Service Commission* (No. 79-134), probable jurisdiction noted October 1, 1979, which has been scheduled for argument with the present case.

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported in 47 NY 2d 94, 417 NYS 2d 30, and is set forth in the Appendix to the Jurisdictional Statement (J. S. App.

A, pp 1a-14a).[1] The opinion of the Appellate Division, Third Department, is reported in 63 AD 2d 364, 407 NYS 2d 735, and is set forth at J. S. App. B, pp 15a-21a.

The opinion of the New York Supreme Court is not reported and is set forth at J. S. App. C, pp 22a-25a. The three opinions of the Public Service Commission are reported in 13 NY PSC 2072, 17 NY PSC 1-R, and 17 NY PSC 17-R and are set forth at J. S. Apps. D-1, D-2 and D-3, respectively.

Jurisdiction

Appellant (hereinafter "Central Hudson") commenced this action, seeking review of and declaratory relief against the Commission's orders of February 25 and July 14, 1977 under Article 78 of the New York Civil Practice Law and Rules, on November 10, 1977 in the Supreme Court, Albany County. As it had before the Public Service Commission (hereinafter the "Commission"), Central Hudson challenged the order banning promotional advertising as in violation of the First and Fourteenth Amendments to the United States Constitution.[2] The New York Supreme Court rejected Central Hudson's constitutional contentions, affirmed the validity of the Commission's orders, and denied the relief sought. The Appellate Division, Third Department, on July 27, 1978, affirmed the judgment below, and rejected appellant's attacks on the orders as unauthorized by statute and invalid under the federal and state constitutions.

The judgment of the Court of Appeals, rejecting all of appellant's statutory and constitutional contentions and affirming the

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[1] "J. S. App." refers to the Appendix to the Jurisdictional Statement (a separate volume filed with the Jurisdictional Statement). "A." refers to the Appendix filed with Appellant's Brief. "R." refers to the Record on Appeal in the court below.

[2] Appellant's petition to the New York Supreme Court is set forth at J. S. App. E, pp. 68a-73a. It also challenged the validity of the order under the state constitution, and other features of the Commission's order not involved in this appeal.

judgment below, was entered May 1, 1979 (J. S. App. F-1, p 74a). Appellant's motion for reargument was timely filed on May 30, 1979, and was denied on July 9, 1979 (J. S. App. F-2, p 75a). Appellant's Notice of Appeal to this Court was filed with the Court of Appeals and the New York Supreme Court on August 22, 1979 (J. S. App. G, pp 76a-79a). This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. § 1257 (2). The following cases, *inter alia*, sustain this Court's jurisdiction on appeal: *Williams* v *Bruffy*, 96 US 176, 183; *Live Oak Ass'n.* v *Railroad Commission*, 269 US 354; *Lake Erie & Western R. Co.* v *Public Utilities Commission*, 249 US 422; *Hamilton* v *Regents*, 293 US 245; *Atchison R. Co.* v *Public Utilities Commission*, 346 US 346, 348-49; *Lathrop* v *Donohue*, 367 US 820, 825.

On November 26, 1979 this Court noted probable jurisdiction.

Statutes Involved

The Commission's initial order banning promotional advertising by electric utility companies, issued December 5, 1973, provides, in pertinent part (J. S. App. D-1, p 31a):

> All electric corporations are hereby prohibited from promoting the use of electricity through the use of advertising. . . .[3]

This order was continued in effect by the Commission's orders of February 25 and July 14, 1977, as set forth in J. S. Apps. D-2 and D-3, and it is these continuing orders which are challenged in this appeal. The relevant provisions of the New

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[3] The remainder of the order treats with promotion of the use of electricity through subsidy payments and employee incentives. Central Hudson is not here contesting the Commission's authority to prohibit such subsidy payments or employee incentives.

Despite the fact that the document establishing the ban is captioned "Notice of Proposal to Issue Order Restricting Certain Uses of Electrical Energy" (J. S. App. D-1, p 25a), the portion which referred to the ban on promotional advertising by electric utilities is a final order (J. S. App. D-1, p 31a par. 2).

York Public Service Law, held by the Court of Appeals to authorize the promulgation of these orders by the Commission, are set forth in J. S. App. H, pp 80a-83a.

Questions Presented

The Court of Appeals of New York State rejected appellant's contentions that the New York Public Service Law gives the Commission no authority to issue the orders here in question and that the orders are in violation of the First and Fourteenth Amendments to the Constitution of the United States. The questions presented are:

> (1) Whether the Public Service Law, as so construed by the Court of Appeals and as applied in this case by the Commission, and the Commission's orders banning advertising by electric utility companies, facially or as applied to appellant, are in violation of the First Amendment, as made applicable to the States by the Fourteenth Amendment; and
>
> (2) Whether the Public Service Law, as so construed and applied, and the Commission's orders, facially or as applied, are in violation of the Equal Protection clause of the Fourteenth Amendment.

Statement of the Case

The Commission's initial order banning "promotional advertising" by electric utility companies,[4] was issued in Decem-

[4] In 1970 and 1971 the Commission had banned promotional advertising respectively by telephone and gas companies, at a time when lack of telephone capacity and natural gas supplies jeopardized continuing service to existing customers. The gas companies were also ordered, pursuant to explicit statutory authority (Public Service Law Section 66-a), to conform to specified limitations on the attachment of new customers (11 NY PSC 1257). On June 21, 1972 the Commission declined to impose a similar advertising prohibition on electric utilities (12 NY PSC 108-R). The ban on telephone company advertising was lifted in March, 1973 (13 NY PSC 461). The ban on gas promotional advertising has recently been lifted for some gas utilities (including Central Hudson) due to the recent increased availability of natural gas (Case No. 25766, *Gas Restrictions*, Order dated September 6, 1979).

ber, 1973, at the height of the oil supply constraint consequent upon the Arab oil embargo following the October 1973 Arab-Israeli conflict, and was based on the Commission's conclusion that the electric utility system in New York State "does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973-74 winter." (J. S. App. D-1, p 26a).[5] At about the same time the Commission ordered a state-wide voltage reduction (13 NY PSC 2183). The latter order was rescinded on March 29, 1974 after the Arab oil embargo had been lifted, and upon a finding that New York electric utilities had "substantial inventories" of fuel (14 NY PSC 551); the advertising ban, however, remained in effect.

Opposition to continuance of the ban was publicly voiced, and on July 28, 1976 the Commission issued a "Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices" (the pertinent provisions of which are set forth in J. S. App. I, pp 84a-87a). Numerous written comments were received, including Central Hudson's letter of September 10, 1976 (A. pp A10-A12), urging that the ban be lifted on grounds both of policy and of constitutional law as then recently determined in *Va. Pharmacy Bd.* v *Va. Consumer Council,* 425 US 748 (1976). No evidentiary hearing or adversary process was given, despite requests to that effect by the Attorney General and the Consumer Protection Board of New York State (R. 645 and 502).

On February 25, 1977, the Commission issued its "Statement of Policy on Advertising and Promotional Practices of Public Utilities" (J. S. App. D-2, p 32a), directing that "the existing ban on promotion of electricity sales shall be continued". There was no evidence before the Commission of any shortage of fuel

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[5] The validity of the Commission's original ban of December, 1973 on promotional advertising is not in question on this appeal. At the time of its issuance there was real doubt that fuel supplies for electric generation would remain sufficient even to maintain existing service, and there was no reason for Central Hudson to contemplate promotional advertising.

oil or electrical capacity; the Commission relied primarily on its conclusion that (J. S. App. D-2, p 37a) increased use of electrical energy "would aggravate the nation's already unacceptably high level of dependence on foreign sources of supply and would, in addition, frustrate rather than encourage conservation efforts". Dr. Alfred E. Kahn, the then Commission Chairman, concurring "with the greatest reluctance and distaste", relied also on the ground that promotion of electricity usage would cause an increase in peak consumption which, under the existing rate structure, "is artificially subsidized." (J. S. App. D-2, p 51a).

On March 28, 1977 Central Hudson petitioned the Commission for a rehearing. This and other such petitions were denied by the Commission in an opinion and order issued July 14, 1977 (J. S. App. D-3). The Commission relied primarily on the ground previously voiced by Chairman Kahn, i.e. that the existing "imperfectly structured electric rates" do not "fully reflect the much higher marginal costs of on-peak consumption", and that: "The promotion of electric consumption at rates that do not reflect the costs of it to society is not the kind of commercial speech contemplated by *Virginia Board of Pharmacy.*" (J. S. App. D-3, p 58a).

Thereafter, Central Hudson commenced the present action, as described above.[6] In the New York Supreme Court, the ban on promotional advertising was upheld solely on the ground (originally set forth by Chairman Kahn) that "because of inefficient rate structure" increased peak usage of electricity would not be "properly priced", and that therefore the ban "advances a significant public interest" sufficient to justify the incursion on

---

[6] In the New York courts, Central Hudson challenged other features of the Commission's order of February 25, 1977, which are not involved in the present appeal.

This appeal raises no question with respect to payment for the costs of promotional advertising. The Commission's ban applies regardless of how the costs of promotional advertising are allocated. Pursuant to Section 113(b)(5) of the Public Utility Regulatory Policies Act of 1978, 42 U.S.C. § 2623(b)(5), a Federal standard is established, for consideration by state regulatory bodies, requiring that the costs of promotional advertising be borne by the shareholders or other owners.

First Amendment values (J. S. App. C, p 23a). Affirming, the Appellate Division, Third Department, cited, as establishing a "compelling" state interest in the ban, three matters relied on by the Commission, to wit: (1) increased use of electricity would cause "spiraling price increases due to the fact that present rates do not cover the marginal cost of new capacity"; (2) advertising "provides misleading signals" that energy conservation is unnecessary; and (3) additional usage will "increase the level of dependence on foreign sources of fuel oil." (J. S. App. B, p 19a).

On appeal, the Court of Appeals rejected Central Hudson's threshold challenge to the statutory authority of the Commission (which had also been raised below), ruling (J. S. App. A, pp 3a-7a) that "the legislature has conferred vast power upon the Public Service Commission", including "general supervision" of electric utilities, and the duty "to encourage . . . the preservation of environmental values and the conservation of natural resources." The prohibition of promotional advertising was held to be a "reasonable measure" to "prevent wasteful consumption or unneeded expansion of utility services." (J.S. App. A, p 5a).

Turning to the First Amendment issue, the Court of Appeals acknowledged (J. S. App. A, p 10a) that the Commission's ban "works a direct curtailment of expressional activity: an entire category of speech is prohibited because of its potential impact upon the society", and that such regulations "have been subjected to an exacting standard of review, the precise level of that standard being determined by reference to the nature of the communication." However, relying principally on *Ohralik* v *Ohio State Bar Ass'n.*, 436 US 447, the Court of Appeals ruled that (J. S. App. A, p 13a) "the ban on promotional advertising of electricity is consistent with First Amendment strictures".

In support of this conclusion the Court of Appeals first cited the "extensive government regulation" to which public utilities are generally subjected, and then concluded that since there is no "competitive shopping" for electricity on the basis of price, because the rates are fixed by the Commission, promotional advertising conveys no information of value to the recipient. Furthermore, in view of "the present energy crisis" (of which

the Court took judicial notice), such communications might be "affirmatively detrimental" and "exacerbate the crisis". This hazard, said the Court, "constitutes a compelling justification for the ban".

Central Hudson's motion for reargument was denied without opinion.

SUMMARY OF ARGUMENT

The Commission's order is unconstitutional under *Va. Pharmacy Bd.* v. *Va. Consumer Council*, 425 US 748, and this Court's subsequent decisions dealing with "commercial speech". The advertising here in question does much more than propose a commercial transaction; it conveys information of value to the energy consumer and is entitled to substantial First Amendment protection. The asserted contervailing state interests are insufficient to justify the prohibitory order.

I.

Important First Amendment Interests are Infringed. The recent "commercial speech" decisions are in line with this Court's increasing concern for the rights of the recipient of information. The interests of the energy consumer in the free flow of information were overlooked by the New York court.

A. Although appellant has a franchised monopoly of the distribution of electrical energy in its service area, it has no monopoly of the uses to which that energy is put. The New York court mistakenly conceived that Central Hudson operates in a "noncompetitive market", whereas in fact the market for the supplying of heat and power is highly competitive between electricity, natural gas, and house heating oil, and electricity has only a minor fraction of that market. Although Central Hudson does not presently intend to promote electrical resistance heating (a situation which cost and supply factors could readily change), it does wish to promote off-peak consumption and energy-saving electrical uses and devices, among which the heat pump is most important, as both state and proposed federal

legislation have recognized. Appellee's attempts to belittle these considerations are unconvincing.

B. Appellant's First Amendment rights are not diminished by its status as a regulated public utility corporation, since it is not only appellant's self-interest but also the interests of the energy-consuming public which are governing. *First National Bank of Boston* v. *Bellotti*, 435 US 765. Making full allowance for the "commonsense differences" between commercial and non-commercial speech, which the Court has previously noted, there is no feature of the present case which renders the caveats so voiced applicable here. The Commission's ban is not directed at deceptive or misleading advertising, no person-to-person solicitation is involved, and the challenged order is an absolute prohibition and not a mere regulation of time, place and manner. The order bans speech which is entirely lawful and inoffensive, and the order's application is determined solely by the content of the speech.

II.

The state interests advanced to justify the suppression of speech effected by the order are insufficient. Three such interests are asserted by the Commission. The New York court relied only on one of them, *i.e.* oil conservation.

A. *Oil conservation.* The New York court took judicial notice of "the present energy crisis" and summarily concluded (App. A, pp 13a-14a) that promotional advertising of electric energy "would only serve to exacerbate the crisis", and that this constituted a "compelling justification for the ban." The Commission's claim of conservational benefits from the advertising ban was modest, and is not the primary factor invoked by the Commission in its defense. Although the energy crisis (and specifically dependence on foreign oil supplies) is a national problem, no other state imposes such a prohibition, and the pertinent federal legislation affirmatively recognizes the legitimacy of promoting the use of electrical energy. The quantum of energy economy achieved by prohibiting the promotion of electric resistance heating is insignificant, especially in compari-

son to luxury wastage of oil in, for example, large automobiles and snowmobiles, the use and promotion of which the government continues to tolerate. Inasmuch as the Commission's order prohibits promoting electrical usage which conserves energy and diminishes the use of oil, it is counterproductive.

B. *Ratemaking*. The Commission's principal defense of the promotional ban is based on the "marginal cost" theory of ratemaking, which focuses on the proposition that unit-of-energy costs are higher at peak load than off-peak periods, and therefore rates should be higher during peak periods. On this footing, the Commission argues that promotion of electrical usage will tend to increase peak loads, and that under presently used "average cost" ratemaking the off-peak user subsidizes the on-peak user. Therefore, the Commission concludes, promotion must be prohibited until such "marginal cost" ratemaking can be put into effect.

What this overlooks, however, is that prohibiting promotion of electrical usage contributes nothing to a resolution of the marginal cost ratemaking problem. The Commission has ample power within the traditional bounds of utility regulation, by the exercise of its authority over rates, accounting, metering, etc., to introduce marginal cost theory into the ratemaking process. Marginal cost problems confront all the state utility regulatory bodies, yet not a single other such agency has recognized any need to prohibit promotion of electrical usage. Advertising is but one of a myriad of factors that may increase peak load. The Commission's argument is of extraordinary breadth, and would appear to justify the suppression of speech whenever its content may have collateral effect in the exercise of its traditional and acknowledged powers.

C. *"Misleading Signals"*. The Commission contends that promotion of electricity will give to the public "misleading signals" that energy conservation is unnecessary. There is nothing in the record to support the suggestion that Central Hudson's proposed advertising will convey any such impression. Even if that assumption is indulged, this sort of argument is not new and has been repeatedly rejected by this Court. *Va. Pharmacy*

Bd., supra at 769-70 and 773; *Linmark Associates, Inc.* v. *Willingboro,* 431 US 85, at 96-97; *Bates* v. *State Bar of Arizona,* 433 US 350 at 374-75. Furthermore, since the order does not prohibit utility companies from responding to inquiries about the advantages of particular electrical uses, the effect of the ban is to conceal from the public the fact that such information is obtainable from the companies.

III.

The order, and the Public Service Law as construed and applied, are unconstitutional for vagueness, overbreadth, and lack of standards.

A. *The Public Service Law.* The governing statute suffers from no inherent or facial constitutional defect, but in this case has been construed and applied by the highest state court as giving the Commission speech-limiting powers which are nowhere specified in the statute and which are thus wholly lacking in legislative standards. The Commission concedes that the Public Service Law "is not a statute designed to regulate speech." Its structure and provisions are comparable to those of at least 47 other states having regulatory bodies with supervisory power over electric utilities. The "public interest" and "public welfare" standards, while accepted as sufficient for ratemaking and other economic purposes, are insufficient for the regulation of speech. *Hannegan* v. *Esquire,* 327 US 146. The New York court did nothing to limit its construction, and the result of its decision is to confer broad and unspecified speech-limiting powers on the Commission. To affirm the decision below would be to open the door, constitutionally, to like construction of the statutes in the other 47 states.

B. The Commission's order itself is unconstitutional on grounds of both overbreadth and vagueness. As far as concerns oil conservation (the only ground regarded by the New York court) the order is overbroad because it prohibits advertising of electrical uses which conserve oil. Although the Commission's opinions are exclusively concerned with space heating and cooling, the order is not so limited, and covers electrical use for

lighting, and for transportation and other power purposes. It likewise suffers from vagueness, for the phrase "promotional advertising" is susceptible to a variety of interpretations. Does it cover only public and general advertising, or apply also to individual or institutional solicitation? These defects are, in all probability, due to the lack of any evidentiary basis for the order, which is based on little but the Commission members' *a priori* conclusions.

IV.

The Order and the authorizing statute are unconstitutional under the equal protection clause. The prohibitory order applies only to promotion by the regulated electric utility companies. The dealers in home heating oil remain free to advertise. The classification is irrational, as the oil sold by these dealers constitutes over three-fourths of all residential heating energy in Central Hudson's service area. The fact that the utility companies and not the oil dealers are subject to the Commission's jurisdiction is constitutionally irrelevant. The standard of review to be applied here is a rigorous one, since the discrimination is in terms of First Amendment rights. *Police Department of Chicago* v. *Mosley,* 408 US 92, at 95-96; see also *San Antonio Ind. School Dist.* v. *Rodriguez,* 411 US 1, at 34 n. 75, 61, 63, and 112-15.

ARGUMENT

The Public Service Commission's order prohibiting "promotional advertising"[7] by electric utilities is plainly unconstitutional under the principles repeatedly laid down by this Court in the *Virginia Pharmacy* case, *supra,* and its other recent decisions dealing with "commercial speech". The Commission's order bans speech which is entirely truthful, and lawful in all respects save under the order itself.

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[7] The term thus employed by the Commission embraces a wide range of informational and invitational activities, from those whose sole purpose is to increase existing types of consumption to those which inform potential customers of new or little known uses or devices in which they may find improved quality or economy.

Furthermore, the order bans speech which does much more than propose a commercial transaction—speech which conveys information of great importance to the consumer of energy and touches closely on vital societal interests. Central Hudson asserts, therefore, that its promotional speech is entitled to substantial protection under the First Amendment, which is intended, above all, to protect the free flow of information from the efforts, however well intentioned, of governmental officials to prescribe what is "good" or "bad" for the public to know.

Accordingly, Central Hudson contends that the Commission's order is facially unconstitutional, and that the Commission lacks constitutional authority to prohibit electric utility companies from promoting the use, for any lawful purpose, of the electric energy they distribute. Although Central Hudson does not presently intend to promote electric resistance space heating or conventional air conditioning, it does wish to increase its off-peak load and to publicize new and improved uses of electricity which are conducive to energy conservation and diminished reliance on oil. These devices, despite their energy-saving characteristics, do involve increased use of electricity, and their promotion is therefore prohibited by the Commission's order. It is Central Hudson's immediate purpose in this litigation to be freed of these restrictions on the promotion of electrical uses which will benefit the public and, in the long run, help to alleviate the national energy problem.

I.

Important First Amendment Rights Are Infringed By the Commission's Order Prohibiting Promotional Advertising By Electric Utility Companies.

This Court's abandonment of the rule in *Valentine* v. *Chrestensen,* 316 US 52, and recognition of First Amendment protection for commercial speech, was not an isolated decisional development. Rather it was a logical outgrowth of the principle, increasingly stressed during the last twenty-five years, that the First Amendment is not for the sole benefit of those who speak

and write, but also of those who listen and read. *Martin* v. *Struthers,* 319 US 141, 143 (1943); *Lamont* v. *Postmaster General,* 381 US 301, 307-08 (1965); *Red Lion Broadcasting Co.* v. *FCC,* 395 US 367, 390 (1969); *Kleindienst* v. *Mandel,* 408 US 753, 762-63 (1972); *Procunier* v. *Martinez,* 416 US 396, 408-09 (1974). The applicability of this principle was recognized in the first decision[8] applying First Amendment values to commercial speech, *Bigelow* v. *Virginia,* 421 US 809, 818-26, and was the fulcrum of decision in Mr. Justice Blackmun's germinal opinion in the *Virginia Pharmacy* case, 425 US at 763-65, 769-70.

To be sure, the interests of the advertiser are not negligible, and have weight in the First Amendment decisional scales. See e.g., the *Virginia Pharmacy* case, *supra* at 762-63. But societal rather than individual interests have been the principal focus of decision in subsequent commercial speech cases involving advertising. *Linmark Associates, Inc.* v. *Willingboro,* 431 US 83 at 92, 96-97; *Bates* v. *State Bar of Arizona,* 433 US 350 at 363-64, 368-79.

We believe that it was the tendency of the Commission and the New York courts to center their discussion on the interests of Central Hudson as they perceived those interests, and their insufficient attention to societal values—primarily those of the energy-consuming public—that led the Commission and the State courts into grievous error in their disposition of the constitutional issues in the present case.

A. The First Amendment Values here at Stake are Substantial and Merit a High Degree of Protection Against State Infringement.

Energy, be it electrical or in some other form, is not socially useful in and of itself, but for the services it provides—chiefly light, heat, and motive power. The ultimate source of energy is the sun, but in terrestrial terms it is found not only in the sun's

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[8] The demise of *Valentine* v. *Chrestensen, supra,* had been adumbrated in *Pittsburgh Press Co.* v. *Human Rel. Comm'n.,* 413 US 376, 384-88, 393, 398, 401-02 (1973).

direct radiation, but in coal, oil, and other fossil fuels, the natural movement of water, and many other forms including, most recently, nuclear fission. Some of these sources are useable only by their conversion into electricity, while others (notably the fossil fuels) can be tapped directly by the user.

Thus the consumer of energy is often confronted with options, for these several sources of energy, and forms of energy distribution, have radically differing qualities and characteristics, and comparative advantages and disadvantages, depending upon the use to which they are to be put. Furthermore, these comparative factors are unstable, for both natural and human events may and often do alter the circumstances in which consumer choice must be made.

This is the complicated and fluctuating milieu to which promotional advertising of any basic energy form such as electricity must be addressed. But one would never realize this from the opinion of the New York Court of Appeals, which makes no reference to energy sources that compete with electricity, and reduces the First Amendment values at stake here to the "nadir", by reasoning as follows (J. S. App. A, pp 12a-13a):

> In view of the noncompetitive market in which electric corporations operate, it is difficult to discern how the promotional advertising of electricity might contribute to society's interest in "informed and reliable" economic decisionmaking. Consumers have no choice regarding the source of their electric power; the price of electricity simply may not be reduced by competitive shopping.* * *
>
> Indeed, promotional advertising is not at all concerned with furnishing information as to the "availability, nature, and prices" of electrical service. It seeks, instead, to encourage the increased consumption of electricity, whether during peak hours or off-peak hours. Thus, not only does such communication lack any beneficial informative content, but it may be affirmatively detrimental to the society.

It is true, of course, that Central Hudson is the sole distributor of electrical energy in its operational area, and that the price is regulated by the Commission. But the description of the mar-

ket in which electric utilities operate as "noncompetitive" reveals the depth of the court's misunderstanding, for while electricity does furnish virtually all light, it is in competition with other forms of energy in supplying heat and power.[9] Furthermore, it is apparent from the Commission's two opinions continuing in effect the promotional ban (J. S. Apps. D-2 and D-3), that the Commission was primarily concerned with the use of electricity for space and water heating and air conditioning.

In the market for space and water heating, there is intense competition between electricity, natural gas (which Central Hudson also distributes), and house heating oil. Electricity has the smallest share of the three, and electricity and natural gas together have less than one-quarter of the market.[10] Each of the three rival energy sources has comparative advantages and disadvantages, in terms of both price and quality. The significance of all this for First Amendment purposes was well described by Judge Pratt in the *Long Island Lighting* case[11] (J. S. App. J, pp 92a-93a):

> Beyond LILCO's economic interest is the public's interest in the free flow of information on the use of electrical energy for home heating. The consumer has a substantial interest in receiving truthful information on electric space heating. Not only does promotional advertising provide information of general public interest concerning electrical energy, it also assists an individual's

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[9] Of total end use energy consumption in New York State in 1978, it is officially estimated that electricity supplied only 11.5%. Petroleum products account for 67.5%, natural gas comprises 18.3%, and coal furnishes the remaining 2.7%. See *Draft Report, New York State Energy Master Plan,* New York State Energy Office, August 1979, Figure IV-14.

[10] In 1978 in Central Hudson's service territory, residential heating was 9.3% electric, 12.4% gas, and 78.3% oil. See Central Hudson's Annual Report for the Year Ended December 31, 1978 to the Public Service Commission. Natural gas distribution facilities are available in Central Hudson's service territory only in and near cities.

[11] *Long Island Lighting Co.* v. *Public Service Commission,* —F. Supp — (E.D.N.Y., Docket No. 77C972, March 30, 1979), now pending on appeal in the Court of Appeals for the Second Circuit.

> economic decisions on the benefits and detriments of electric heat. Choosing among oil, gas, or electric residential heating may significantly affect his budget and daily comfort. Moreover, the public in general has an interest in receiving information on the various methods of heating, in order to utilize energy resources ecologically and efficiently.[12]

In contrast to the foregoing, the state court's opinion in the present case would give one to believe that Central Hudson proposes, by advertising, to urge its customers to keep their buildings hotter in winter and cooler in summer. Whatever might be said for or against constitutional protection for such speech, no such question is raised in this case.

Electrical resistance heating (the electrical method presently in common use), is clean, odorless, and cheap to install, but it entails running costs which have generally been higher than those for gas or home oil, and it is this factor which accounts for its present minor share of the space heating market.[13] Apart from resistance heating, however, there are heating uses for electrical energy which are both economical and efficient, and the use of which is highly conducive to energy conservation.

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[12] See also comparable portions of Chairman Kahn's separate opinion (J. S. App. D-2, pp 49a-51a).

[13] By letter dated September 6, 1979, the Commission granted Central Hudson permission to engage in promotional advertising of gas heating. Central Hudson has subsequently done so, but piped gas is available to customers only in urban areas, so that in the non-urban areas of Central Hudson's service territory the competition is between electrical and home oil heating. Despite the higher cost, electrical heating's advantages continue to attract customers.

In the past, the difficulty with gas heating has been the serious fluctuations, for reasons largely unrelated to the world oil situation, in the available supply of natural gas. In recent years, shortages in New York State have been so acute that the Legislature has authorized the Commission to control the attachment of new customers, and the extent of service to existing customers (Public Service Law Sections 66(2) and 66-a). As noted above (footnote 4), in 1971 the Commission banned promotional advertising by gas companies, but more recently has been lifting the prohibition on a piecemeal basis.

Of these, the electrically-powered heat pump[14] is the most immediately promising, as its technology is relatively advanced and it is far more energy-efficient than any heating equipment presently in general use.[15] The New York State Legislature, by amendment to the Home Insulation and Energy Conservation Act of 1977 (L. 1977, c. 858), has very recently specified the installation of a heat pump as an "energy conservation measure" eligible for financing by public utilities under an approved "home conservation plan".[16] Since heat pumps are electrically powered, this has resulted in the anomalous situation that Central Hudson is forbidden by the Commission's order to promote the use of a device the home installation of which, under the state's conservation program, Central Hudson may be obligated to finance.

With improving technology, self-generating energy sources such as private hydro, solar, and windmill systems are now

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[14] Although the Commission's order does not so specify, its opinion on rehearing makes it clear the promotional ban applies not only to advertising electric energy, but also to utility company advertising of appliances that consume electric energy (J. S. App. D-3, p 59a).

[15] A heat pump heats a building by drawing in heat from the outside air, and cools it (like an air conditioner but more efficiently) by expelling interior heat to the outside air. The pump heats effectively as long as the outside air temperature is over 30° Fahr. which, in Central Hudson's area, is about 78% of the time during the heating season. When temperatures drop below this level a back-up system (oil, gas, or electricity) is required. In his opinion Chairman Kahn expressed concern about the air conditioning capability of the heat pump (J. S. App. D-2, p 51a), but the price of a heat pump is high enough so that few would buy it who would not otherwise install a less efficient air conditioner. Furthermore, pumps which heat but do not cool are available.

[16] Public Service Law Section 135-a, as amended November 6, 1979, by L. 1979, c. 741. See also the Senate Finance Committee's Rep. 96-394 (96th Cong. 1st. Sess., Nov. 1, 1979), reporting favorably H.R. 3919, which provides in Sec. 202(a)(2) for a "residential energy" tax credit for heat pumps which replace electric resistance space or water heating, or are used as a back-up system for a solar water heating system.

becoming practical. Electricity is the most suitable supplement or back-up for these systems, and it is electrical uses such as these, embodying improvements in quality or economy, which Central Hudson presently wishes to promote.[17]

The Commission's effort to belittle these values (in their Motion to Dismiss or Affirm at pp. 12-13) is unconvincing. True it is that heating systems are not changed "every few years", but new homes are built, and existing systems may be converted. Whether the initial choice is made by the builder or the householder is irrelevant. The suggestion that the availability of information from electric appliance dealers justifies silencing the utility companies is the same argument that this Court categorically rejected in the *Virginia Pharmacy* case, 425 US at 757: "We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means . . ."

Accordingly, the state court's discussion of the First Amendment issue in terms of the price of electricity is far wide of the mark. The question is not one of shopping for cheap electric energy, but of comparing electricity with other available energy sources for furnishing heat and power. One of the most serious concerns of electric and other utilities is technical obsolescence or changing public life styles which may endanger the utilities' survival, just as the urban electric trolley car and the railroads are presently threatened. Thus the continued health of electric utilities depends on the development and publicizing of new and

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[17] It is, however, our contention that the Commission's prohibition is unconstitutional *in toto,* including its application to electrical resistance heating, as was held by Judge Pratt in the *Long Island Lighting* case, *supra* n. 11. The reasons why Central Hudson has no present intention of promoting resistance heating are its presently higher cost and Central Hudson's reluctance to increase its peak loads. Although Central Hudson has excess generating capacity for present loads, a large increase in peak load might require construction of additional generating plant at a time when the cost of capital is extremely high. However, the field of competitive energy is multi-faceted and volatile, and changing technical or cost factors may well justify altered policies in the future.

improved methods which will redound to public benefit in terms of cost and quality.

Of course, Central Hudson's self-interest is very much a part of its position on these issues. But that factor in no way limits its right to promote its own interests and point of view. See *Eastern R.R. Presidents Conference* v. *Noerr Motors Freight,* 365 US 127, at 139: "Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which government must act." So must individuals. Whether or not Central Hudson's voice is heeded, it is entitled under the First Amendment to be heard. And, as we will now show, its stifling cannot be justified by the fact that the voice is that of a public utility corporation.

B. Appellant's First Amendment Rights Are Not Diminished by its Status as a Regulated Public Utility Corporation, or by the Commercial Character of Its Advertising Message.

In First National Bank of Boston v. Bellotti, 435 US 765, this Court dealt with a Massachusetts statute which severely limited the right of specified types of corporations, including banks, public utilities,[18] and business corporations, to spend money in order to influence elections or referenda. Holding that the statutory restrictions violated the First Amendment, the Court (per Justice Powell) observed (435 US at 775-76):

> The court below framed the principal question as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amend-

[18] Appellants in the *Bellotti* case included two banks and three business corporations, but no public utilities. However, there is nothing in the wording or logic of the Court's opinion to suggest that the ruling or opinion would have been different as applied to public utility corporations.

> ment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] . . . abridges expression that the First Amendment was meant to protect. We hold that it does.

The fact that the *Bellotti* case concerned "political" and the present case "commercial" speech subtracts nothing from the force of the point made: that the test is not the identity of the communicator but the First Amendment interests of the communicants. Indeed, Justice White, dissenting (with Justices Brennan and Marshall), thought that the communicants' interests would have been greater had the speech been commercial-promotional (435 US at 807-8):

> I recognize that there may be certain communications undertaken by corporations which could not be restricted without impinging seriously upon the right to receive information. In the absence of advertising and similar promotional activities, for example, the ability of consumers to obtain information relating to products manufactured by corporations would be significantly impeded.

Accordingly, the emphasis laid by the New York court upon the "vast power" of the Commission (J. S. App. A, p 4a) and the "regulated and franchised" status of public utilities (J. S. App. A, p 13a) as justifying restricting their right of speech, is misplaced,[19] for these characteristics do not determine the communicant interests involved in utility advertising. Furthermore, just as the banks in the *Bellotti* case were under "extensive government regulation" (J. S. App. A, p 13a), so were the pharmacists in the *Virginia Pharmacy* case, 425 US 748, 750-51, and *Carey* v *Population Services,* 431 US 678, 701, as well as the lawyers in *Bates* v *State Bar of Arizona,* 433 US 350, 353 et seq. In all these cases the ban on advertising was invalidated.

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[19] See also the remarks of Chairman Kahn in his concurring opinion (J. S. App. D-2, p 52a: "I do not regard flat prohibitions of promotion by public utility companies abhorrent as a matter of principle. Where a company enjoys something close to a monopoly, conferred upon it by public franchise, it does not in my judgment have an unfettered right to advertise."

Nor do *Ohralik* v. *Ohio State Bar Ass'n,* 436 US 447, and other decisions noting "commonsense differences" between commercial and other speech, support the validity of the Commission's promotional ban, for none of the factors remarked or relied on in those cases are relevant to the present one. The *Virginia Pharmacy* case, 425 US at 771, referred to "deceptive or misleading" advertising, as did also the *Bates* case, 432 US at 383-84. The *Ohralik* case, *supra,* particularly relied on by the New York Court of Appeals (J. S. App. A, pp 12a-13a), and *In re Primus,* 436 US 412, both turned on the characteristics and dangers of in-person solicitation of a lawyer-client relation, and weighed the hazards of (436 US at 461): ". . . stirring up litigation, assertions of fraudulent claims, debasing the legal profession, and potential harm to the client in the form of overreaching, overcharging, underrepresentation, and misrepresentation." The decision in *Friedman* v. *Rogers,* 440 US 1, at 9-11, involved the allegedly deceptive and misleading use of optometrical trade names.

None of these matters is involved in the present case, and the Commission's ban on promotional advertising is not directed at any of these problems or hazards. It is a total ban on all such advertising, regardless of its character, quality, style, or purpose. It bans speech which advocates no unlawful conduct, and is neither fraudulent, deceptive, obscene, libelous, nor provocative of violence. The order is not a regulation of "time, place and manner"; its limits are fixed exclusively by the content of the speech and, given the prohibited content, the ban is absolute and all-inclusive.

In the light of the foregoing circumstances and considerations, we respectfully submit, the Commission's order cannot survive scrutiny under the First and Fourteenth Amendments.

II.

The State Interests Asserted By Appellee Are Insufficient to Justify the First Amendment Infringements Effected By Appellee's Order.

Although the Public Service Commission and the lower New York Courts relied on three separate reasons to support the promotional advertising ban, the Court of Appeals made no

mention of two of them, and relied solely on the argument that the prohibition would aid in "conserving diminishing resources" of energy. However, in its Motion to Dismiss or Affirm (pp 16-18) the Commission continued to press the arguments disregarded by the Court of Appeals, and accordingly we deal with them following our discussion of the conservation argument.

A. Oil Conservation.

The sole state interest relied on by the Court of Appeals was described, at the very end of its opinion (J. S. App. A, pp 13a-14a), as follows:

> It would not strain the bounds of judicial notice for us to take cognizance of the present energy crisis. Conserving diminishing resources is a matter of vital state concern and increased use of electrical energy is inimical to our interest. Promotional advertising, if permitted, would only serve to exacerbate the crisis. In short, this constitutes a compelling justification for the ban.

Assuredly, oil conservation is a most important national policy, but the question remains whether or not the promotional advertising ban will measurably contribute to its fulfillment. The Commission itself made but a faintly affirmative claim (J. S. App. D-2, p 37a), acknowledging that the promotional ban "may aptly be described as piecemeal conservationism since promotion of oil for use in heating or internal combustion applications is not similarly proscribed", and that the ban "will be less than optimally effective, in a national context", while lamely concluding that it "will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales."[20]

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[20] If it is true, as indicated in the Commission's Motion to Dismiss (p 12, n. 4), that there is a shortage of the No. 2 oil used in home oil furnaces, conservation considerations would suggest that electric heating is now preferable, as there is no current shortage of the residual oil used in the generation of electricity, and there is no suggestion in the record that there was any such shortage at the time of the Commission's decision to continue the promotional ban. Moreover, the record shows (contrary to the cited footnote) that the heating oil dealers do in fact advertise (R. 351-52 and 579).

Now, if this were a case such as *Wickard* v. *Filburn*, 317 US 111, in which a general and nationwide prohibition is enforced against persons whose individual impact on the problem is negligible, on the basis that the impact of many such persons is substantial, the New York regulation, whether or not constitutional, might be rationally related to its avowed aim. But the present case is not in that posture, for *no other state is imposing a similar ban*. In no state save Oklahoma has a like prohibition ever been imposed—even in 1973 at the time of the Arab oil embargo—and in Oklahoma the promotional advertising ban was held invalid as "arbitrary". *State* v *Oklahoma Gas & Electric Co.*, 536 P 2d 887, 895 (Okla. 1975).[21]

Furthermore, the "present energy crisis" of which the New York court took notice, is a national problem dealt with primarily by policies fixed at the national level. Federal energy policies do not prohibit promotional advertising by electric utilities, and by plain implication recognize their legitimacy. Section 113(b)(5) of the Public Utility Regulatory Policies Act of 1978, 42 U.S.C. §2623(b)(5), provides: "No electric utility may recover from any person other than the shareholders (or other owners) of such utility any direct or indirect expenditure by such utility for promotional or political advertising . . ." The incompatibility of this provision with prohibition of promotional advertising is confirmed in the Report of the Joint Conference Committee, which explicitly states that no prohibition of either promotional or political advertising by electric utilities was intended.[22]

Thus the Commission's concern for the effect of electric utility advertising on the energy crisis is shared neither by the federal nor the other state governments.

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[21] In Nebraska, where electric utilities are publicly owned, a promotional advertising ban for other privately owned utilities was considered, but discarded after the State Attorney General ruled that such a ban would be unconstitutional as an impairment of freedom of speech. Neb. Op. Att'y Gen. No. 8 (1979).

[22] Pertinent extracts from the United States Congressional Committee Reports relating to Section 113(b)(5) of the Public Utilities Regulatory Policies Act of 1978 and its predecessor bill are set forth in J. S. App. K pp 98a-100a.

In its Motion to Dismiss or Affirm (p 14) the Commission professes that it "fails to understand" the relevance of these circumstances. This Court's recent commercial speech cases have all involved the assertion of state interests to justify the limitation on speech, and a balancing judgment by the Court.[23] Full recognition of the importance of oil conservation does not obviate the necessity of scrutinizing the necessity for and efficacy of official measures, adopted in the name of conservation, which abridge fundamental rights. Certainly the fact that neither the federal government (the authority primarily charged with responsibility for dealing with the national energy shortage), nor any of the 49 other states, has applied a similar ban reflects adversely on the need for and wisdom of the Commission's order. Equally, the universally negative attitude in the federal and other state jurisdictions indicates that enforcement of the advertising ban in New York State alone will have insignificant results quantitatively.

Contrary to the Commission's argument (Motion to Dismiss, pp 15-16) there is no inconsistency between Central Hudson's support of conservation and its desire to regain freedom of speech. As shown heretofore (*supra,* pp 17-19), there are uses of electricity which will diminish the use of oil, and it is these energy-saving devices which Central Hudson presently wishes to promote. Neither the National Energy Conservation Policy Act of 1978 nor the 1977 amendments to the New York Public Service Law, cited by the Commission (Motion to Dismiss, pp 15-16), lend any support to its arguments for, as we have seen, the sponsors of the federal act consciously rejected the idea of an advertising ban, and the New York conservation amendments now provide for utility financing for heat pumps, which the Commission's order forbids utilities from publicizing.

Assuming that electric resistance heating powered by oil-fired generators uses somewhat more oil than home oil furnaces,[24] the

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[23] See, e.g., the *Virginia Pharmacy* case, 425 US at 766-70; *Linmark Associates, Inc.* v. *Willingboro,* 431 US at 94-97; *Bates* v. *State Bar of Arizona,* 433 US at 368-79.

[24] As Chairman Kahn's concurring opinion shows (J. S. App. D-2, p 50a), the additional amount of oil used in resistance heating is difficult to quantify.

fact remains that the Commission has not seen fit to limit its use, but only its promotion by advertising.[25] Perhaps our society should by now have concluded that no uses of oil which, in the strictest sense, are unnecessary, should be advertised. But it has not done so, and there is something more than faintly absurd about praising the promotional ban on electric heating as a conservation measure, while Cadillacs and snowmobiles are not similarly treated.

Given the freedom of Central Hudson's oil furnace competitors to cry their wares, and the public tolerance of flashy television advertisements for powerful cars and potent gasoline, inviting consumer spending for services far less necessary than home heating, it is nothing short of ludicrous to describe the Commission's order as serving any substantial, let alone compelling, state interest in terms of oil conservation.

B. Ratemaking.

Despite the Court of Appeals' disregard of it, the Commission continues to place primary reliance[26] on the "marginal cost" rate problem as justification for the promotional ban. In summary form, this problem, in its supposed application to promotional advertising, may be described as follows: (1) electric utilities confront both hour-of-the-day and seasonal fluctuations of customer demand, resulting in "peak" and "off-peak" loads; (2) most utilities have several sources of supply (i.e. generating plants, contract suppliers, etc.) of varying cost-efficiency; (3) economy dictates that the most cost-efficient sources be used first, and the less cost-efficient be drawn on only

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[25] To whatever extent the appellee's argument that the competition between oil and electricity is quantitatively insignificant (Motion to Dismiss, p. 13) may be taken is valid, it *pari passu* diminishes the quantitative significance of the appellee's arguments in support of the ban.

[26] See the Motion to Dismiss (p 18) repeating the Commission's intention to review the promotional ban "at such time as the problems presented by an inadequate utility rate design no longer exist." This suggests that the other arguments are makeweight, and that the ban would be continued, even if New York State were awash with oil, until the rate structure is adjusted to the Commission's satisfaction.

when necessary to meet increasing load, i.e., approaching peak; (4) if there are reliable indications of future demand that will create peaks beyond the company's existing capacity, additional plant must be constructed which, because of inflation, high interest rates, and increased capital costs will probably be more costly than existing sources; (5) therefore, the unit cost of electricity will be higher during peak than off-peak periods; (6) average cost, which has been the basis of ratemaking in the past, does not reflect the aforesaid differential, with the result that the off-peak consumer is overcharged and the on-peak consumer undercharged; and (7) increased demand, which promotional advertising may stimulate, will raise the peaks, and increase both the unit cost of the energy and the degree to which the off-peak consumer subsidizes the on-peak consumer.[27] The term "marginal cost" denotes the cost of the last unit of energy furnished to meet peak demand.

The New York Public Service Commission has concluded, with regard to both electricity and gas, that marginal costs "provide a reasonable basis" for rate structure, and must be treated as "an important element of rate design."[28] Appellant did not oppose those determinations and does not question their rational basis. But in assessing the validity under the First Amendment of the promotional ban, it must be realized that, while there is widespread professional agreement with the conceptual basis of the marginal cost theory, there is equally widespread disagreement and controversy concerning the extent, if any, to which marginal cost theory can be used as the basis of utility ratemak-

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[27] The "marginal cost problem" was not one of the factors listed by the Commission for consideration when it opened the proceeding leading to continuation of the promotional ban (J. S. App. I, pp 85a-87a). Nor was it mentioned in the Commission's statement of policy continuing the ban (J. S. App. D-2, pp 36a-38a), but first surfaced in Chairman Kahn's concurring opinion (J. S. App. D-2, pp 51a-52a), and then was picked up and stressed by the Commission in its opinion and order denying rehearing (J. S. App. D-3, pp 58a-59a).

[28] Case No. 26806, *Electric Rate Design*, 16 NY PSC 671 (1976); Case No. 26835, *Relevance of Marginal Costs to Regulation of Gas Distribution Companies*, Opinion No. 79-19, issued September 17, 1979.

ing,[29] in view of the many difficulties and complexities which must be confronted.[30] The Commission itself has characterized its approach to the practical implementation of marginal cost theory as one of "gradualism consistent with appreciable improvement",[31] and it is indisputable that resolution of the marginal cost "problem" will be a long and tortuous process, as the Commission reveals (Motion to Dismiss, pp 17-18 and n. 6) by its observation that after a proceeding commenced in January of 1975 and concluded in August of 1976 "sufficient data has not yet been accumulated", and that "economically practical time-of-day metering equipment" has not yet been devised.

Appellant possesses in ample degree the traditional utility-regulatory powers over such matters as ratemaking, accounting, and metering. The exercise of these powers to resolve the marginal cost problem presents, within the range of rationality, no

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[29] For example, the Public Utilities Commission of Colorado, after a lengthy proceeding, recently decided that "marginal cost analysis as a basis for determining costs upon which rates are established is not now appropriate for implementation in Colorado. . . ." Case No. 5963, *Rate Structure of All Electric Utilities,* July 27, 1979, p 100.

In New York State there is disagreement among state agencies on marginal or incremental pricing of natural gas. While the Commission supports such pricing (see n. 28), the New York State Energy Office opposes it because of its concern that such pricing will increase the cost of gas to industrial customers and drive them from using gas to using oil. *Draft Report, New York State Energy Master Plan,* New York State Energy Office, August 1979, Section V-D, pp 46 and 49-50.

[30] See, e.g., the Colorado decision cited in note 29 at pp. 84-101, and the testimony of Dr. W. H. Melody in Case No. 26806, *Electric Rate Design, supra,* n. 26, Tr. pp. 2624 et seq. Marginal cost-based rates often must be scaled down to avoid exacting more than a fair return on capital. If computed on a long-term incremental basis, long-term forecasts are involved which are subject to inherent uncertainty. The costs of metering for time-of-day rate purposes is substantial. Furthermore, marginal cost theory appears to be of comparatively little immediate value as applied to companies such as Central Hudson, since its existing energy sources do not vary greatly in cost-efficiency, and the load capacity (existing or contracted for) is sufficient so that the need for additional capacity is not immediate.

[31] Case No. 26806, *Electric Rate Design, supra,* at 692.

constitutional problems. *Matter of New York State Council of Retail Merchants* v. *Public Service Commission,* 45 NY 2d 661, 412 NYS 2d 358 (1978). Furthermore, these are the *only* powers by which the problem can be alleviated or eliminated; the promotional advertising ban contributes *nothing* toward a solution. At most, it artificially limits one of a host of factors which may (but not necessarily will) exert an upward pressure on rates.

For nearly a century utility rates have been based on average cost theory, and if the result is less than perfect, neither is it catastrophic. The issues of whether, when, and how to shift to marginal cost ratemaking confront the Commision irrespective of the predicted effects of promotional advertising—indeed, the problem would be there even if present peak consumption should decline. If peak loads increase, the causes may be population growth or shifts, location of new business enterprises, greater customer demand attributable to prosperity, weather change, or all or any of these and other factors, singly or in combination. Advertising is but one among these many possible factors, and there is no evidence that it would be of much significance.

The proper role of marginal cost in ratemaking is a question that confronts all utility regulatory bodies. Not one of the state regulatory agencies that have seriously considered the adoption of marginal cost ratemaking, including the eleven or more others that have decided to move in that direction, has prohibited advertising as an adjunct to resolution of the problem nor, so far as we know, has even considered such action.[32] It is hard to escape the conclusion that, as far as marginal cost ratemaking is involved, the Commission's order is in the nature of an aspirin taken to alleviate the headache caused by contemplation of a difficult question. It is by the considered and energetic application of its ratemaking powers, rather than by taping the mouths of electric utility managers, that the Commission should engage the problem.

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[32] It may be noted that while the appellant has now approved marginal cost ratemaking for natural gas (footnote 28, *supra*), it has almost simultaneously *lifted* in large part the preexisting prohibition of promotional gas advertising. Case 25766, *Gas Restrictions,* order issued September 6, 1979.

In conclusion, we invite the Court's attention to the extraordinary breadth of the argument which appellee has based on the marginal cost issue. Carried to its logical conclusion, the argument is that the Commission has constitutional authority to limit or prohibit the utility companies' speech whenever, in the Commission's judgment, the effect of the speech is to render more difficult the exercise of its other powers, and to maintain the prohibition in effect until it is satisfied that the other powers are functioning satisfactorily. Surely there is no constitutional warrant for subjecting appellant to such a virtually unlimited reach of state-censorship of speech.

C. "Misleading Signals."

The third reason advanced by the Commission in support of its prohibitory order is that (J.S. App. D-3, p 57a) "promotion of electricity by regulated public utilities provides totally misleading signals that conservation is unnecessary." The Commission further observed this is "especially true since the utilities in this State are expected to promote conservation by their customers", and (p 59a) distinguished the promotion of "electric equipment and appliances" by manufacturers and dealers, whose advertising "will not provide the same misleading signals to the public and at the same time will provide a means for the public to be advised of the available alternatives."

Why the Commission thought that manufacturer or dealer advertising of electricity-consuming devices would not carry the same "misleading signals" as the advertising of the same sorts of devices (such as heat pumps) by the utility companies, is not apparent. Of course, the manufacturers and dealers are not subject to appellee's regulatory jurisdiction, and it may be that this was an ineffectual effort to obscure the fact that silencing only the utility companies may not, after all, protect the public against the dangerous knowledge.

However that may be, the Commission's suggestion that Central Hudson's First Amendment rights can more justifiably be infringed because manufacturers and dealers can say the things about which the utility managers' lips are sealed, is an

argument which this Court decisively rejected in the *Virginia Pharmacy* case, 425 US at 757. Obviously, manufacturers and dealers may say things that Central Hudson would not wish to say, and fail to say the things that Central Hudson might deem important.[33]

Conservation, of course, is not incompatible with necessary or socially desirable consumption; indeed, it serves those ends. There is absolutely nothing in (or outside) the record to suggest that Central Hudson will cease promoting conservation, or that its advertisements would raise doubts of its desirability. Essentially, the Commission is saying that the public cannot be trusted to read appellant's advertising of the availability and uses of electric energy, because it will be confused and likely to forget the continuing flow of conservation messages in the communications media.

That is a pretty severe reflection on the public intelligence, and it is particularly surprising to see such a point made in the light of the Supreme Court's recent decisions which, in three opinions issued in 1976 and 1977, decisively rejected such arguments based on fear of public misunderstanding. In the *Va. Pharmacy case, supra,* the Court wrote (425 US at 769-70 and 773):

> It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost, low-quality service and drive the 'professional' pharmacist out of business. They will respond only to costly and excessive advertising, and end up paying the price . . . . All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what.

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[33] It should be noted, as appellee agrees (Motion to Dismiss, p 15), that with regard to the question of electric appliances and the merits of alternative uses of electricity, "utilities remain free to provide advice to customers if they request it." The effect of the advertising ban, therefore, is to conceal from the public the knowledge that the utility company is able and willing to supply electrical use information.

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. . . .
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> * * *
>
> What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions [footnote deleted], we conclude that the answer to this one is in the negative.

A year later, in the *Linmark* case, *supra*, the Court re-affirmed the principle thus established, in the context of an ordinance prohibiting "For Sale" or "Sold" signs on real estate, in order to stem what was believed to be the flight of white homeowners from a racially integrated neighborhood. Holding the ordinance unconstitutional under the First Amendment, the Court wrote (431 US at 96-97):

> The Township Council here, like the Virginia Assembly in Virginia Pharmacy Bd., acted to prevent its residents from obtaining certain information. That information, which pertains to sales activity in Willingboro, is of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families. The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave town . . . If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act 'irrationally'. Virginia Pharmacy Bd. denies government such sweeping powers.

Seven weeks later, in the *Bates* case, *supra,* the Court struck the same note in the context of Arizona's ban on advertising by lawyers (433 US at 374-75):

> Advertising does not provide a complete foundation on which to select an attorney. But it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers [footnote omitted]. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance. . . .

The fact is, of course, that the communications media are full of "signals" of the most varied kind, which are generally conflicting. But the First Amendment says that there is no referee empowered to identify and choose among these conflicting signals. This is to be left to the discretion of the public. The decisions quoted above have determined that, for better or worse, "concededly truthful information about entirely lawful activity" (*Va. Pharmacy Bd., supra* at 773) cannot be suppressed because of fear that the public will draw what officials believe to be wrong conclusions.

III.

The Order, and the Public Service Law as Construed and Applied By the New York Courts, are Unconstitutional for Vagueness, Overbreadth, and Lack of Standards

The two points now to be addressed are related but basically distinct, as independently based. The imprecision and breadth of the Commission's order are facially apparent, and were attacked by Central Hudson in presenting the case to the New York Court of Appeals. Unlike the Commission's order, the Public Service Law, which establishes the Commission and specifies its

powers, suffers from no inherent or facial constitutional defect, but has now been interpreted by the highest court of the state as giving the Commission powers, to limit and prohibit speech, which are no where specified in the statute and which, therefore, are wholly lacking in guiding legislative standards.[34] We will address the second of these points first.

A. Vagueness, Overbreadth, and Lack of Standards of the Public Service Law as so Construed and Applied

The provisions of the New York Public Service Law (McKinney 1955; Supp. 1978) empowering the Public Serivce Commission to regulate electric utility companies (see J. S. App. H), closely resemble those of at least 28 jurisdictions, including the District of Columbia.[35] The Commission is given

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[34] In its Motion to Dismiss or Affirm (p 19), the Commission contends that these points were not raised below and therefore are not properly before this Court. As shown in appellant's Brief in Opposition to the Motion (pp 2-3), there is no basis for this contention. The second point obviously did not arise until the Court of Appeals had authoritatively construed the Public Service Law; it was a principal point in Central Hudson's Motion for Reargument in that court, and was replied to by appellee. In presenting the statutory point, Central Hudson had argued that to construe the Public Service Law as authorizing speech-limitation would raise grave First Amendment questions.

[35] The approximately 48 states which regulate investor-owned electric utilities grant their respective public utility regulatory bodies general supervisory powers over such utilities. In addition, the following 28 statutes grant their public utility regulatory bodies implied powers similar to the "powers necessary and proper" conferred upon the Commission by New York Public Service Law § 4, subd. 1 (McKinney 1955) and upon which the New York Court of Appeals based its determination that the Commission had authority to promulgate the ban on promotional advertising: Ala. Code tit. 37, § 37-1-31 (1977); Alaska Stat. § 42.05.151 (1978); Ariz. Rev. Stat. § 40-202(a) (1974); Ark. Stat. Ann. § 73-202 (1957); Cal. Public Utilities Code § 701 (West 1975); Conn. Gen. Stat. Ann. § 16-6b (West Supp. 1979); D. C. Code Encycl. § 43-1003 (West 1968); Fla. Stat. Ann. § 366.05 (West 1968); Idaho Code § 61-501 (1976); Iowa Code Ann. § 476.2 (West Supp. 1979); Kan. Stat. § 66-101 (1972); La. Rev. Stat. Ann. § 45:1164 (West 1979); Md. Ann.

(Footnote continues on next page)

(Section 4, subd. 1) "all powers necessary or proper to enable it to carry out the purposes" of the Law; it is directed (Section 5, subd. 2, added in 1970) to "encourage" the companies subject to its jurisdiction to plan and carry out their functions "with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources"; it is endowed (Section 66, subd. 1) with "general supervision" of all electric corporations, and is empowered to order (Section 66, subd. 2) such "reasonable" service improvements "as will best promote the public interest, preserve the public health and protect" customers and employees, to prescribe uniform accounting methods (Section 66, subd. 4) and "just and reasonable rates" (Section 66, subd. 5) and to fulfill a variety of administrative and investigative duties ancillary to the specified substantive powers.

Code art. 78 § 1 (Supp. 1978); Mich. Comp. Laws Ann. § 460.6 (1967); Miss. Code Ann. § 77-3-45 (1972); Mont. Rev. Codes Ann. § 70-104 (Supp. 1977); N.M. Stat. Ann. § 62-6-4 (1978); N.C. Gen. Stat. 62-30 (1975); N.D. Cent. Code § 49-02-02(2) (1978); Okla. Stat. Ann. tit. 17 § 153 (West 1953); Or. Rev. Stat. § 756.040(2) (1975); Pa. Cons. Stat. Ann. tit. 66, § 501-(b) (Purdon Supp. 1979); R.I. Gen. Laws § 39-1-38 (1977); S.C. Code § 58-27-150 (1977); Tex. Rev. Civ. Stat. Ann. art 1446(C) (Vernon Supp. 1978); Utah Code Ann. § 54-4-1 (Supp. 1979); Wis. Stat. Ann. § 196.02 (West 1957); and Wyo. Stat. § 37-2-127 (1977).

While the Court of Appeals cited New York Public Service Law § 5, subd. 2, which empowers the Commission to "encourage" conservation, in its discussion of the authority of the commission to issue the order, it is difficult to understand how a statute which authorizes a governmental body to "encourage" the companies it regulates can be regarded as limiting or rendering more precise the Commission's power to regulate and prohibit speech, with which (under the New York court's decision) it is now vested. Statutes in at least five states empower their respective public utility regulatory bodies to consider or encourage conservation, in a manner analogous to New York Public Service Law § 5, subd. 2 (McKinney Supp. 1978); Colo. Rev. Stat. § 40-2-117 (Supp. 1978); Md. Ann. Code art. 78, § 56 (Supp. 1978). Nev. Rev. Stat. § 703.260(4) (1979); Ohio Rev. Code Ann. § 4905.70 (Anderson Supp. 1978); and Pa. Cons. Stat. Ann. tit. 66, § 308 (Purdon Supp. 1979).

These are the provisions which the New York courts have now construed as authorizing the Commission to prohibit advertising by electric public utilities. The construction so placed on the New York Public Service Law is, of course, beyond the province of this Court to review, but the *fact* of the construction is directly relevant to the federal constitutionality of the Commission's orders, and of the Law itself as so construed and applied.

It is apparent that the Public Service Law sets forth no standard appropriate for or sufficient to sustain a delegation of authority to the Commission to determine what the companies subject to its jurisdiction may or may not say publicly. Standards such as "public interest" or "public welfare" are accepted as sufficient for rate and other economic legislation, but are wholly insufficient for speech-limiting regulation. Appellee concedes (Motion to Dismiss, p 20) that "the Public Service Law is not a statute designed to regulate speech. . . ."

In *Hannegan* v. *Esquire*, 327 US 146, the Postmaster General contended that a federal statute authorized him to suspend second class mailing permits for publications if he had determined that they did not contribute "positively" to the "public good or public welfare". This Court refused so to construe the statute, saying it would be tantamount to deciding whether a publication's contents were "good" or "bad", and added (327 US at 151): "To uphold the order of revocation would, therefore, grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be lightly inferred."[36]

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[36] *Arnett* v. *Kennedy*, 416 U S 134, cited in the Motion to Dismiss (at p. 20) is not germane. The federal statute there involved was not one setting up an administrative agency with "vast power"; it was a statute narrowly targeted at relations between the federal government and its own employees, and the statutory standard for employee discharges was geared to that specific problem, and was held sufficient by a majority of this Court.

This Court has emphasized that in the First Amendment area the "government may regulate . . . only with narrow specificity." *NAACP* v *Button*, 371 US 415, 433. Thus a delegation of power to regulate speech requires much more precise guiding standards than might pass muster in other areas. *Hynes* v *Borough of Oradell*, 425 US 610; *Coates* v *Cincinnati*, 402 US 611; *Keyishian* v *Board of Regents*, 385 US 589; *Lovell* v *Griffin*, 303 US 444. Otherwise such delegation would allow government officials "to pursue their personal predilections." *Smith* v *Goguen*, 415 US 566, 575.

The Court of Appeals has done nothing to narrow, by construction, the circumstances in or purposes for which the Commission may prohibit or otherwise limit speech. It relied on the "present energy crisis" as justifying the promotional advertising ban, but said nothing to suggest that other state interests might not support the promotional advertising ban or other speech limitations. The Commission and the lower New York courts relied on other factors, and their invocation of the "marginal cost" theory, by its logic, would justify a promotional advertising ban at any time the Commission deemed the rate structure incongruent with real costs. The Court of Appeals did not negate other justifications which might be put forward by the Commission for restricting the speech of companies subject to its jurisdiction.[37]

B. Vagueness and Overbreadth of the Commission's Order.

Apart from the lack of guiding standards in the authorizing legislation, the Commission's order itself suffers from both vagueness and overbreadth. In part this is probably the consequence

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[37] The New York courts' cavalier disregard of these questions of precision and authority may be compared with the thoughtful treatment of a comparable problem in the Supreme Court of Idaho's recent decision in *Washington Water Power Co.* v *Kootenai Environmental Alliance and Idaho Public Utilities Commission*, 99 Ida. 875, 881-82, 591 P 2d 122, 128-9 (1979).

of the wholly insufficient evidentiary procedures and record on which the order is based. The Commission's initial order in 1973 was based on general information and inference concerning the effect of the Arab oil embargo on the supply of oil for electric generation (J.S. App. D-1). Although the factual situation on which the order was based did not last beyond the spring of 1974, in 1977 the Commission continued the ban on the basis of comments received by mail. The suggestion of the State Attorney General and State Consumer Protection Board, that an evidentiary hearing be held (R. 645 and 502), was disregarded. In the *Bellotti* case, 435 US at 789, Justice Powell referred critically to the lack of any "record or legislative findings" in support of the challenged statute. In the present case, the legislature has never considered, much less acted upon, the promotional advertising ban, and this, together with the lack of any evidentiary record made by the Commission, has basically flawed the decision-making process.

For whatever reason, the Commission's inclusive and unqualified order is fatally overbroad.[38] Although it is apparent from its opinions that the Commission was concerned primarily if not exclusively with space heating and cooling, it made no effort to confine its order to that area. For example, the order covers the use of electricity for lighting, which uses far less energy than what is required for heating and air conditioning, and which involves safety and human efficiency and productivity values. The order also applies to the use of electricity for power;

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[38] We are mindful of the passage in the *Bates* opinion (433 US at 380-81) stating that the "overbreadth doctrine" does not apply to "professional advertising". But there the Court was discussing overbreadth in regard to its relaxation of the standing limitation, so that a party whose own conduct is not constitutionally protected is allowed to challenge a statute on the ground of its possible application to others whose conduct would be constitutionally protected. No standing problem is involved in the present case, since the Commission's ban is absolute, it applies directly to Central Hudson, and no assertion is made that Central Hudson has not observed its terms.

it would prohibit Central Hudson from promotional advertising of electric vehicles, despite their energy economy and pollution-free performance. Furthermore, the order is more fundamentally flawed in that it is not confined to speech that promotes the use of *energy* or of *oil*, but of electricity. Thus it applies to the promotion of devices and methods for the use of electricity in ways which diminish the use of oil, as where electricity is used to power energy-efficient new devices such as the heat pump, or, in small quantities, to supplement solar or windmill heating systems.

Despite its all-inclusive coverage, the order is vague in that the contours of "promotional advertising" are foggy. Does it cover a consultation initiated by an officer of Central Hudson with an industrial concern on improved and expanded lighting? A speech by the president of Central Hudson to a businessmen's club describing various ways in which electricity can serve their needs? Would it be permissible for Central Hudson to launch a public attack on the wisdom of the Commission's order, when the most publicly effective means of attack would be to portray the diverse uses and other merits of electrical energy? Under the challenged order, the management of Central Hudson is continually faced with questions of this nature in which it must determine whether informational activities in which it wishes to engage are proscribed by the order or not. This, Central Hudson believes, improperly places a cloud over a matter which should be unrestricted, namely the furnishing of truthful information about its own business.

The result of the decision in the Court of Appeals is that the Commission has been allowed to exert prohibitory authority in the sensitive area of freedom of speech, although the New York legislature has never considered the conferring of such authority and there are no appropriate legislative guidelines for its exercise. Since comparable statutes prevail in a majority of the states, affirmance by this Court may well result in similar assertions of authority by state public utility commissions in many other states,

and involve them in problems for which their traditional areas of expertise are wholly unsuited.[39] The lack of governing standards here is reflected in an unqualified order with no evidentiary basis, and thoughtlessly vague and overbroad.

IV.

The Order and the Authorizing Statute are Unconstitutional under the Equal Protection Clause.

As the Commssion itself recognized (J.S. App. D-2, p 37a), the promotional ban to which appellant is subject does not apply to Central Hudson's non-utility competitors, such as oil furnace and heating oil distributors. In the light of the purpose—i.e., oil conservation—on the basis of which the Court of Appeals sustained the order, we submit that the discrimination thus worked between electric utilities and their competitors is irrational, undermines the plausibility of the "compelling interest" so relied on by the Court of Appeals, and violates the equal protection clause of the Fourteenth Amendment.

It is true, of course, that oil furnace heating enterprises are not subject to the Commission's jurisdiction. But its lack of authority over these dealers is not constitutionally significant except to show that it is the state government as a whole, and not the Commission alone, which is responsible for the discrimination. The Court of Appeals has interpreted New York law as authorizing limitations on advertising by utilities but not by their competitors, and that is the discrimination here challenged.

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[39] Cf. The view of the Supreme Court of Idaho in the *Washington Water Power* case, *supra*, addressed to the type of regulation at issue in the *Consolidated Edison* case now pending in this Court: "The subject matter of the Commission's order at issue here does not deal with the subject matter traditionally regulated by public utility commissions and does not fall into a category of regulation which requires the technical expertise of a commission as contrasted with a legislature." 99 Ida. 881-82, 591 P 2d 129.

The constitutional validity of the discrimination must be assessed in the light of the objective the order purports to advance. Since over three fourths of all residential heating in Central Hudson's service area is accomplished by individual oil furnaces, the exclusion of direct oil heating from a prohibition, the purpose of which is to limit the use of oil, is irrational on its face. The situation is an aggravated version of the one confronting this Court in the *Bellotti* case, where (435 US at 793-95) the prohibition applied to banks, utilities, and business corporations but not to "entities or organized groups" with "resources comparable to those of large corporations." The discrimination caused Justice Powell, writing for the Court, to observe (435 US at 793): "Thus the exclusion of Massachusetts business trusts, real estate investment trusts, labor unions, and other associations undermines the plausibility of the State's purported concern for the persons who happen to be shareholders in the banks and corporations covered by [the statute]. . . ."

This Court's decisions have long recognized a close relation between equal protection and freedom of speech in other cases where speech restrictions were applied in a discriminatory way. *Williams* v *Rhodes,* 393 US 23; *Cox* v *New Hampshire,* 312 US 569, 576; *Cox* v *Louisiana,* 379 US 536, 558. In the latter case Justice Black, concurring separately in this portion of the decision, and speaking of a statute which prohibited obstruction of traffic while excepting labor union picketing from its scope, wrote (379 US at 581): "This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment." See also *Erznoznik* v *City of Jacksonville,* 422 US 205, 215; Kalven, *The Concept of the Public Forum,* 1965 Sup. Ct. Rev. 1, 30.

A comparable situation, confronting the Court more recently, involved a Chicago ordinance which exempted peaceful labor picketing from a general prohibition of picketing within 150 feet of a school. *Police Department of Chicago* v *Mosley*, 408 US 92. Holding the ordinance unconstitutional, Justice Marshall wrote for the Court (408 US at 95-96):

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. * * * *
>
> Necessarily . . . under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.

It is plain from these and other cases that the equal protection standard of review is strict in cases such as the present one, where First Amendment impingements are involved. In the *Mosley* case, *supra,* the Court stated that (408 US at 101): "The Equal Protection Clause requires that statutes affecting First Amendment rights be narrowly tailored to their legitimate objectives." And in *San Antonio Ind. School Dist.* v *Rodriguez,* 411 US 1, the Court's opinion (per Powell, J.) referred approvingly to the *Mosley* case, saying (411 US at 34, n. 75): "The stricter standard of review was appropriately applied since the ordinance was one 'affecting First Amendment interests'." See also the comparable statements by the other Justices, 411 US at 61 (Stewart, J.), 63 (Brennan, J.), and 112-15 (Marshall, J.).

There is no rational, let alone compelling, interest to justify the discrimination here in question, and accordingly the Public Service Law as construed and the Commission's order, taken together, should be held invalid under the equal protection clause.

Conclusion

Appellant respectfully submits that the judgment of the Court of Appeals of the State of New York should be reversed and the case remanded with directions that judgment be entered annulling the order of the Commission.

Respectfully submitted,

TELFORD TAYLOR
60 E. 42nd Street
New York, New York 10017
Tel. (212) 661-0930
Counsel for Appellant

Of Counsel:
WALTER A. BOSSERT, JR.
DAVISON W. GRANT
GOULD & WILKIE
One Wall Street
New York, New York 10005
Tel. (212) 344-5680

TAYLOR, FERENCZ & SIMON
60 E. 42nd Street
New York, New York 10017
Tel. (212) 661-0930

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No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLEE

PETER H. SCHIFF
General Counsel

HOWARD J. READ
Assistant General Counsel

JOHN W. DAX
Staff Counsel

Public Service Commission
of the State of New York
Empire State Plaza
Albany, New York 12223
Tel. No. (518) 474-2510

Attorneys for Appellee,
Public Service Commission
of the State of New York

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BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
20 CENTER ST., BATAVIA, N. Y. 14020
PHONE: (716) 344-2000

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

On Appeal From the Court of Appeals of the State of New York

BRIEF FOR APPELLEE

Statement of the Case

A. Introduction

This case involves an appeal from a judgment (J.S. App. 74a-75a)[1] of the Court of Appeals of the State of New York.

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[1] References to J.S. App. ..... are to pages in Appellant's Appendix to Jurisdictional Statement.

The court upheld an order of Appellee Public Service Commission of the State of New York (Commission) banning promotional advertising by New York State electric utilities subject to the Commission's jurisdiction.

The Commission's order accompanied its Statement of Policy on Advertising and Promotional Practices of Public Utilities dated February 25, 1977 (J.S. App. 32a-55a). It continued a prohibition on promotional advertising imposed in the wake of the 1973 Arab oil embargo where the Commission had ordered (J.S. App. 31a): "[a]ll electric corporations are hereby prohibited from promoting the use of electricity through the use of advertising, subsidy payments not committed prior to the date of this order, or employee incentives."

Central Hudson Gas & Electric Corporation (Central Hudson), while not challenging the provisions on subsidy payments or employee incentives, did seek to reverse the promotional advertising restriction in a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules. The Commission's directive was affirmed by the New York Supreme Court (J.S. App. 22a-24a), the Appellate Division of State Supreme Court, Third Department (J.S. App. 15a-21a), and finally, the New York Court of Appeals (J.S. App. 25a-31a).[2]

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[2] A parallel proceeding challenging the Commission's order was brought by Long Island Lighting Company in the United States District Court for the Eastern District of New York. Judge Pratt granted Long Island Lighting Company judgment declaring that the Commission's advertising policy statement and subsequent implementing orders: "... to the extent that they prohibit plaintiff LONG ISLAND LIGHTING COMPANY (LILCO) from truthful promotional advertising of electric space heating, violates the First Amendment and are, therefore, unconstitutional..." He enjoined the Commission from enforcing its prohibition but stayed his order pending consideration of the case by the United States Court of Appeals for the

(Footnote continued on following page)

The *Central Hudson* case was determined in the State courts concurrently with another proceeding, *Consolidated Edison Company of New York, Inc. v. Public Service Commission of the State of New York*. That case involved a challenge to another portion of the Commission's Advertising Policy Statement—a prohibition on the use of bill inserts by utilities to espouse the position of utility management on controversial matters of public policy. The Court has noted probable jurisdiction (No. 79-134, October 1, 1979) of Consolidated Edison's appeal. This Court subsequently noted probable jurisdiction in the present case on November 26, 1979.[3]

B. The Decisions Below

The Commission's February 25, 1977 policy statement was issued at the culmination of its investigation into advertising practices by New York State utilities. During the investigation, the Commission considered, *inter alia*, whether it should alter its 1973 ban on promotional advertising by electric utilities (J.S. App. 25a-31a). No party advocated per-

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(Footnote continued from preceding page)

Second Circuit. Portions of Judge Pratt's opinion dealing with promotional advertising are included at J.S. App. 88a-97a. No decision has as yet been reached by the Second Circuit. Petitions for certiorari to consolidate the Long Island Lighting Company case with the instant case, and *Consolidated Edison Company of New York, Inc. v. Public Service Commission of the State of New York* (79-134), by Long Island Lighting Company (79-629) and Scientists' Institute for Public Information, *et al.* (79-595) have been denied .....U.S..... (January 14, 1980).

[3] In addition to Central Hudson's brief, we are also in receipt of briefs from several *amici* urging that this Court reverse the determination of the New York Court of Appeals. We have carefully examined the briefs of the *amici* and believe that we have dealt with the points made in those briefs in the context of our response to Central Hudson's submission. Several references will be made specifically to the brief of Long Island Lighting Company (LILCO) because of its detailed comments on various aspects of this case.

mitting general promotion of electricity and the Commission did not find persuasive the contention that its ban should be relaxed to allow promotional advertisement to encourage increasing off-peak loads (including electric space heating). The Commission stated (J.S. App. 36a-37a):

> We recognize now, as the Commission did in 1972, that development of off-peak loads may be beneficial in numerous ways. Increased off-peak generation, however, while conferring some beneficial side effects, also consumes valuable energy resources and, if it is the result of increased sales, necessarily creates incremental air pollution and thermal discharges to waterways. More important, any increase in off-peak generation from most of the major companies producing electricity in this State would not, at this time, be produced from coal or nuclear resources, but would require the use of oil-fired generating facilities. The increased requirement for fuel oil to serve the incremental off-peak load created by promotional advertising would aggravate the nation's already unacceptably high level of dependence on foreign sources of supply and would, in addition, frustrate rather than encourage conservation efforts. We realize, too, that a continued ban on promotion of off-peak electric usage may aptly be described as piecemeal conservationism since promotion of oil for use in heating or internal combustion applications is not similarly proscribed. Nevertheless, conservation of energy resources remains our highest priority. We do not consider it inconsistent with that principle to implement programs that admittedly will be less than optimally effective, in a national context. It is reasonable to believe that a continued proscription of promotion of electric sales will re-

> sult in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales.

The Commission did state that it would allow advertising if the "preponderant" purpose was to shift load from peak to off-peak (J.S. App. 37a). In addition, the Commission stated that it would be prepared to reconsider its ban from time to time if conditions change sufficiently to warrant it (J.S. App. 38a).

Several parties petitioned for reconsideration of the Commission's order. When denying the petitions, the Commission specifically considered the free speech First Amendment consequences of its order in response to a contention by Central Hudson that its right of free speech was abridged (J.S. App. 57a-58a):

> Central Hudson excepts to our decision to continue the existing prohibition of promotional advertising by both electric and gas companies. The utility contends that under *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), commercial speech is protected by the guarantees of the Bill of Rights and, therefore, our restriction on promotional advertising is void.
>
> * * *
>
> In *Virginia State Board of Pharmacy*, the Court could find no legitimate State interest in restricting the dissemination of pricing information to the public. A much different situation exists here. The rates of electric utilities in this State continue to rise. The need for such increases derives in substantial part from pressures for increasing plant capacity to meeting growing demand. While some progress is being made to price electricity to

meet its marginal cost, it is clear that the rates charged today do not cover the marginal costs of new capacity. In these circumstances, promotion of electric usage by electric utilities will simply exacerbate the pressure for spiraling prices. Moreover, when national policy requires energy conservation, the promotion of electricity by regulated public utilities provides totally misleading signals that conservation is unnecessary. This is especially true since the utilities in this State are expected to promote conservation by their customers.

While promotion of off-peak usage, particularly electric space heating, is touted by some as desirable because it might increase off-peak usage and thereby improve a summer-peaking company's load factor, we are convinced that off-peak promotion, especially in the context of imperfectly structured electric rates, is inconsistent with the public interest,[1] even if it could be divorced in the public mind from promoting electric usage generally. As we pointed out in our Policy Statement, increases in generation, even off-peak generation, at this time, requires the burning of scarce oil resources.[2] This increased requirement for fuel oil aggravates the nation's already high level of dependence on foreign sources of supply.

An additional area of legitimate State interest was pointed out by Chairman Kahn in his separate statement. The uncontrolled promotion of electric heating most likely means the installation of heat pumps, since they are the most promising mechanism for offsetting the

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[1] Advertisements encouraging installation of heating equipment will frequently occur during the summer periods when air-conditioning usage is at its peak and when requests for conservation are being made.

[2] We distinguish here between promotional advertising designed to shift existing consumption from peak to off-peak hours and advertising designed to promote additional consumption during off-peak hours. It is the latter that we proscribe here.

> relative inefficiency of converting fossil fuels into electricity; but installation of a heat pump means also installation of central air-conditioning. To this extent, promotion of off-peak electric space heating involves promotion of on-peak summer air-conditioning as well as on-peak usage of electricity for water heating. And the price of electricity to most consumers in the State does not now fully reflect the much higher marginal costs of on-peak consumption in summer peaking markets. In these circumstances, there would be a subsidization of consumption on-peak, and consequently, higher rates for all consumers. The promotion of electric consumption at rates that do not reflect the costs of it to society is not the kind of commercial speech contemplated by Virginia Board of Pharmacy.

Finally, the Commission concluded (J.S. App. 59a):

> It is clear, therefore, that there are ample grounds here for regulation of commercial speech. Manufacturers and dealers, whom we do not regulate, remain free to promote the use of electric equipment and appliances. Such advertising will not provide the same misleading signals to the public and at the same time will provide a means for the public to be advised of the available alternatives.

Central Hudson's attack on the Commission's ban has been rejected three times by New York State courts (J.S. App. 22a-24a, 15a-21a, 25a-31a). The New York Court of Appeals, affirming the decisions below, rejected Central Hudson's contention that the Commission lacks statutory authority to impose its ban and that the ban violates Central Hudson's constitutional right to freedom of speech and equal protection. The Court found clear authority for the Commission's order under the New York State Public Service Law Sections 4, 5, 65 and 66. It noted the imperative need for a utility subject to the Commission's jurisdiction to act in a reasonable manner that

will conserve resources of the state and nation (J.S. App. 4a-5a). The Court further found that the ban did not abridge Central Hudson's constitutional rights, citing the lower level of protection for commercial speech enunciated by this Court in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (J.S. App. 10a). It found that utilities supply energy in a monopoly context making information customers might receive from promotional advertising by utilities of little value since service standards and rates are set by the Commission (J.S. App. 12a-13a). The Court concluded (J.S. App. 13a-14a):

> Indeed, promotional advertising is not at all concerned with furnishing information as to the "availability, nature, and price" of electrical service. It seeks, instead, to encourage the increased consumption of electricity, whether during peak hours or off-peak hours. Thus, not only does such communication lack any beneficial and informative content, but may be affirmatively detrimental to the society. It would not strain the bounds of judicial notice for us to take cognizance of the present energy crisis. Conserving diminishing resources is a matter of state concern and increased use of electricity is inimicable to our interests. Promotional advertising, if permitted, would only serve to exacerbate the crisis. In short, this constitutes a compelling justification for the ban.

Central Hudson thereupon brought this appeal (J.S. App. 76a-77a).

Summary of Argument

The New York Court of Appeals properly concluded that the Commission's restriction on promotional advertising by electric utilities was not prohibited by the First Amendment. The Court found that the Commission's prohibition was a reasonable restriction on electric utilities' commercial speech supported by paramount state interests.

In recent decisions, this Court when extending a measure of protection to commercial speech has been careful to note that there are "commonsense differences" between commercial speech occurring in an area traditionally subject to government regulation and other varieties. In this case, the would-be speaker is a regulated utility whose rates and service are completely controlled and subject to the regulation of the Commission. The Commission found that the monopoly supplier of electric service would not be acting in the public interest if it were to *promote* electric usage. Primarily, the Commission determined that promotion of electric usage is contrary to the express national and state policy of energy conservation (including lessened dependence upon foreign sources of oil supply) and attempts to achieve rate stability.

In addition, the Commission's promotional advertising ban and the Public Service Law are neither vague, lacking in standards nor overbroad. The Commission's directive, adopted pursuant to express authority conveyed in the Public Service Law, places electric utilities on notice as to what is prohibited, *i.e.*, promotional advertising, and extends no further than the promotion of electricity which the Commission has sought to ban. It does not bar furnishing of truthful and non-misleading information through utility advertisements that do not promote electric usage.

Finally, the Commission's order does not deprive electric utilities of equal protection in relation to oil heat dealers who are unaffected by the restriction. The Commission's ban is designed to advance specific governmental interests, many of no relevance to the fuel oil industry. The State is not required to regulate all promoters of energy at once, but may move gradually toward this goal.

ARGUMENT

I. The Commission's prohibition of promotional advertising is consistent with First Amendment requirements as delineated by this Court.

Despite Central Hudson's glowing generalities concerning the sanctity of free speech (Br. pp. 14-22), this case must be viewed on its own facts. The company is simply attempting to have this Court extend its prior decisions providing a measure of protection for commercial speech to the case where a regulated utility desires to promote the use of electric energy in the face of a finding by the Commission that promotion is detrimental to the public interest. Since this case involves commercial speech (Central Hudson desires to advertise to sell more electricity), the Commission's ban must be seen in light of the applicable constitutional standard enunciated by the Court when it recently extended First Amendment protection to commercial speech.

Commercial speech is the subject of a number of cases, including *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (pharmacists); *Bigelow v. Virginia*, 421 U.S. 806 (1975) (abortion services); *Linmark Associates, Inc. v. Town of Willingboro*, 431 U.S. 85 (1977) (residential real estate transactions); *Carey v.*

Population Services International, 321 U.S. 678 (1977) (contraceptives); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (legal services); *Friedman v. Rogers*, 440 U.S. 1 (1979) (use of trade names) and *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (solicitation of legal services). In addition, the Court has also considered First Amendment rights of corporations in the political arena in *First National Bank of Boston v. Bellotti*, 435 U.S. 763 (1978).[4] In the cases, where it has struck down prohibitions on advertising, and in *Bellotti*, the determination has been accompanied with a finding that the bans were not warranted by the state interests purported to be achieved. This Court has been careful, however, when extending First Amendment protection to commercial free speech to recognize that where important governmental interests are served by advertising bans that the prohibitions would be permitted. The Court has carefully noted that the interests purported to be served when free speech rights are abridged in the commercial context must be weighed against the rights of the speaker and the public to give and receive information. This Court has never found that a commercial advertising ban accomplished an important state objective and then found the ban to be invalid.

From *Virginia State Board of Pharmacy* to *Bates* to *Ohralik*, the Court has noted differences between commercial speech and other kinds. Its most complete enunciation of the special nature of commercial speech came in *Ohralik* (436 U.S. at 455-456 (1978)):

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[4] This Court has never considered commercial speech in the context of a monopoly supplier of services such as Central Hudson that may offer no service or charge no rate that is not subject to regulatory approval. The distinction is of particular importance because it relates directly to the state interests sought to be achieved by the Commission's advertising ban. (See Point II below.)

> Expression concerning purely commercial transactions has come within the ambit of the Amendment's protection only recently.[12] In rejecting the notion that such speech "is wholly outside the protection of the First Amendment," *Virginia Pharmacy, supra,* at 761, we were careful not to hold "that it is wholly undifferentiable from other forms" of speech. 425 U.S., at 771 n. 24. We have not discarded the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ibid.* To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

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[12] See *Valentine v. Chrestensen,* 316 U.S. 52 (1942); *Pittsburgh Press Co. v. Human Relations Comm'n,* 413 U.S. 376 (1973); *Bigelow v. Virginia,* 421 U.S. 809 (1975); *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748 (1976).

The Court further explained the relationship between the First Amendment and government regulation[3] (436 U.S. at 456):

> Moreover, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part in-

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[3] The Court in *Ohralik,* thus reaffirmed the "two tier" theory of speech first formulated in *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942).

itiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (CA2 1968), cert. denied, 394 U.S. 976 (1969), corporate proxy statements, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921), and employers' threats of retaliation for the labor activities of employees, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61-62 (1973). Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. Neither *Virginia Pharmacy* nor *Bates* purported to cast doubt on the permissibility of these kinds of commercial regulation.

In order to relate better the Commission's order to cases previously decided by this Court, it must be remembered that the ban applies to only *promotional* advertising and not other types of advertising. Electric utilities may disseminate information about electricity and its uses so long as they do not promote its use.[6] This case is therefore much more like *Ohralik* than *Bates*. Ohralik's purported advertising was basically an attempt to have a client use his service whereas in *Bates* the advertisement under consideration simply provided price information so a potential client could judge whether to avail himself of Bates' service. This case unlike *Bates* does not present the question of whether the state can stifle all advertising concerning electricity.

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[6] To our knowledge no utility has attempted an informational advertising campaign although it would not be prohibited by the Commission's order.

The New York Court of Appeals was fully justified in following this Court's decisions when it upheld the Commission's ban on promotional advertising by electric utilities. The ban is an important tool for carrying out a valid state regulatory scheme that assures conservation of foreign fuel oil, the lowest possible rates to electric utility customers and general conservation of electric usage.

Central Hudson argues (Br. pp. 14-20) that promotion of electricity is of value both to the utility and to its customers and therefore deserving of a high degree of constitutional protection.[7] The utility's analysis, however, amounts to nothing more than an attempt to debate the findings of the Commission and the New York State courts as to the desirability of promotion.

While it apparently agrees (Br. p. 17) that promotion generally is not warranted and would exercise voluntary self-restraint, Central Hudson particularly seeks to promote through advertising some devices, including heat pumps, as energy conservation measures because it is in intense competition for space and water heating with gas and oil.

The problem with Central Hudson's argument is, as the Commission found (J.S. App. 57a), that any promotion of electricity runs directly counter to the utility's obligation to promote conservation and runs afoul of other state interests.

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[7] Central Hudson's assertion (Br. p. 14) that the Commission and the New York courts failed to consider the interests of the energy consuming public is totally without support. The Court of Appeals (J.S. App. 13a-14a) and the Commission (J.S. App. 37a, 57a-58a) both stressed the detrimental impact on the public if utilities engage in promotion. Central Hudson and the *amici*, including LILCO, also imply incorrectly that they are barred from informational advertising that advises the public that the utility is available to provide information on electric costs and equipment.

(*See* Point II below.) Obviously some advertisements may be less damaging to the public interest than others, but neither Central Hudson nor any other party made an attempt before the Commission to demonstrate or argue for a specific advertising strategy that would avoid the difficulties that the Commission found inherent in electric utility promotional advertising. The Commission, therefore, continued to enforce its ban on promotion which it had instituted in 1973.

Central Hudson's assertions that some promotion may be in the public interest are unsupported by the record. For example, Central Hudson's contention that heat pumps should be advertised was specifically rejected by the Commission (J.S. App. 58a) since the installation of heat pumps would lead also to the installation of central air-conditioning (a peak electric use). The company's rejoinder (Br. p. 18 n. 15) to this finding is the speculation, totally unsupported by the record, that "few would buy it who would not otherwise install a less efficient air-conditioner". If the company seriously believes this to be true, it might at least have brought the matter to the attention of the Commission as a reason for relaxing its ban.*

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* Central Hudson observes (Br. p. 18) that it may have to finance the installation of heat pumps pursuant to Article VII-A of the New York Public Service Law. The law, however, specifies that financing will have to be provided only if heat pumps are cost effective (will pay for themselves in seven years). Regulations implementing the heat pump provision of the law have not yet been promulgated.

Federal regulations implementing the National Energy Conservation Policy Act address the question of when utilities must provide audits to customers concerning the costs of various energy conservation devices. Those regulations, 10 C.F.R. Section 456.105(f) (3) (i), provide that heat pumps will only be audited to replace the same fuel type, *i.e.*, electricity. Further, the federal regulations (10 C.F.R. Section 456.102) provide that state measures implementing NECPA cannot include devices not included in the federal regulations unless it can be demonstrated to the Secretary of the Department of Energy that the device will use less oil than the heating source it replaces (10 CFR Section 456.319(b) (3) (i)). Since electricity in New York State is generated on the margin by oil, whether such a demonstration can be made remains to be seen.

Central Hudson also attacks (Br. p. 15) the finding of the Court of Appeals that since it operates in a non-competitive environment there will be little public good served by promoting a product (electricity) whose price and service is controlled by the Commission. The electric customer, of course, cannot be the recipient of a sale or a service extra because Central Hudson must charge nondiscriminatory rates and provide nondiscriminatory service (Public Service Law § 65). Therefore, unlike the potential customer of the pharmacist (*Virginia State Board of Pharmacy*), and subsequent cases decided by this Court in a competitive environment, the Court of Appeals found (J.S. App. 13a) that the consumer simply will not be able to find a better deal on electricity by shopping around.

Central Hudson's reply is that in one usage area, heating, it must compete with gas (which it also sells) and oil. The company, however, agrees (Br. p. 19) that heating systems are not changed every few years. For the bulk of Central Hudson's customers, the choice of heating fuel was made when their houses were built and advertising concerning new heating sources simply is of no more use to them then advertisements for snowmobiles would be to an audience of Florida consumers.

There may be some small body of consumers in Central Hudson's territory who are considering the installation of electric rather than oil heat. An aggressive promotional advertising campaign by Central Hudson *might* lead those customers to install electric space heating. In contrast to this small group, however, is the total body of Central Hudson's electric ratepayers who, the Commission found, will be adversely affected by promotional advertising. Unlike competitive economic entities, if Central Hudson's advertising

ultimately raises costs to all consumers (for the reasons discussed in Point II below), the Commission will have no alternative but to allow Central Hudson its reasonably incurred expenses and a reasonable rate of return on its investment (Public Service Law § 66). This case is therefore completely unlike the competitive situation existing in *Virginia State Board of Pharmacy* and subsequent cases considered by this Court where, if the advertiser was subsequently forced to raise its prices, the consumer could simply shift to another source of supply. The conscientious shopper could therefore take advantage of advertised products while later withdrawing patronage if another competitor offered more favorable terms. Here, Central Hudson's customers as a group will be forced to bear the ill effects of the utility's advertising since they have only one source of electric energy available.

Central Hudson also speculates (Br. pp. 18-19) on possible new products and uses of electricity it may desire to promote. If Central Hudson or any other utility has a specific proposal to advertise products that will be in accordance with the interests of utility ratepayers, the utilities may ask the Commission for exemptions from its advertising ban.[9] Any refusal to modify the ban would be readily reviewable in the state courts pursuant to Article 78 of the New York Civil Practice Law and Rules.

As a related matter, *amicus* LILCO adds the unsupported and misplaced contention (Br. pp. 11-20) that the Commission is somehow attempting to ban electric space heating

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[9] As an example of advertising that would be permissible, the Commission specifically offered (J.S. App. 37a) to entertain advertising proposals which would encourage shifts in consumption from more expensive peak to less expensive off-peak usage.

by stifling information and inhibiting consumer choices.[10] In this respect LILCO has totally misrepresented the Commission's position. This case is not one concerning the merits of electric space heating. Rather, the Commission's order under attack bans the promotion through advertising of all electric usage in order to accomplish certain important state objectives discussed, *infra*, that can be accomplished in no other way.[11] LILCO's brief, unlike Central Hudson's, does not consider the issue of promotional advertising generally which is the subject of the Commission's order, but rather attempts to show that electric space heating should be exempted from the Commission's promotional advertising ban.

After its argument that electric promotional advertising should be protected because of its value to society, Central Hudson also argues (Br. pp. 20-22) that neither its status as a utility nor the commercial character of its advertising diminishes its First Amendment protection. We have already discussed this Court's decisions on advertising, noting that in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), the Court determined that commercial communication may be regulated by the state when it is "deemed harmful to the public" even if speech is part of the activity. Central Hudson notes (Br. p. 22) that *Ohralik* concerned in-person solicitation for legal services, a fact not present here. It is apparent from

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[10] For example, LILCO's brief (p. 10 n. 12) argues, without record support that the "...Commission believes that such a consumer choice would be unfortunate..."

[11] The Commission has never taken the position that electric space heating should be discouraged. Its sole concern is the promotion of electric usage by electric utilities. The Commission, of course, has ample statutory authority to ban electric space heating (Public Service Law § 66(2)), but has chosen not to do so because a sufficient basis for such an action has not been shown.

the language of this Court, however, that it was not merely concerned with specific issues at hand, but rather was discussing generally the role of regulation in regard to First Amendment protection for commercial speech. The Court was clearly correct when it has noted the "commonsense difference" between commercial speech and other forms, differences which fully support regulation of speech by electric utilities. Moreover, *Ohralik*, like the present case, concerned the adverse effects of promotional advertising rather than the informational advertising involved in many of the other recent commercial speech cases decided by this Court. As we discuss in Point II below, the detrimental effect of promotional advertising prohibited here far outweighs any asserted benefit to society.

II. The Commission's prohibition of promotional advertising fulfills paramount state interests.

Central Hudson (Br. pp. 22-33) seeks to minimize the importance of the state interests underlying the Commission's prohibition of electric promotion. The company is apparently unable to argue with the Commission's finding that energy conservation and rate stability are important interests which are properly subject to regulation by the state.[12] Its argument therefore is primarily limited to an attempt to show that the Commission's ban will not fulfill the goals it purports to achieve. We believe that this attack on the Commission's order is neither correct nor sufficient to show that the ban is not justified.

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[12] Insofar as national policy is concerned, Section 102 of the National Energy Conservation Policy Act, provides:

> The Congress finds that (1) the United States faces an energy shortage arising from increasing demand for energy, particularly for oil and natural gas, and inefficient domestic supplies of oil and natural gas to satisfy that demand:...

Before pursuing the state interests underlying the Commission's restriction, it is first necessary to review briefly the Commission's legal relationship with respect to electric utilities in New York State, including Central Hudson. The Commission's restrictions on promotional advertising are grounded in its concern that Central Hudson fulfill its obligation under the New York Public Service Law to provide "adequate" service at "just and reasonable" rates (Section 65(1)). The Commission, under state law, is required to set reasonable rates (New York Public Service Law §§ 66(2) and (12); 72). The Commission has also been authorized by the Legislature to prescribe ". . . such reasonable improvements [in Central Hudson's practices] as will best promote the public interest . . ." (New York Public Service Law § 66(2)).

Further, in the performance of its duties the Commission is required to ". . . encourage all persons and corporations subject to its jurisdiction to formulate and carry out long-range programs, individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources." (New York Public Service Law § 5(2)). The State courts have interpreted the latter section of the law as providing the Commission with authority to require such diverse measures as underground electric facilities (*Sleepy Hollow Lake, Inc. v. Public Service Commission*, 43 A.D.2d 439 (3d Dept.), motion for leave to appeal denied, 34 N.Y.2d 519 (1974), and home insulation (*Oil Heat Institute of Long Island, Inc. v. State of New York Public Service Commission*, 91 Misc. 2d 109 (Supreme Court, Albany County, 1977). There is no aspect of Central Hudson's actions related to the rendition of utility service that is not subject to regulation by the Commission.

Accordingly, the Court of Appeals found that the order was reasonably related to the Commission's regulatory responsibilities. As the Court stated (J.S. App. pp. 4a-5a):

> In light of the current exigencies, one of the policies of any public legislation must be the conservation of our vital and irreplaceable resources.
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> • • •
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> It necessarily follows, therefore, that the commission possesses ample power to prescribe reasonable measures designed to prevent wasteful consumption or unneeded expansion of utility services. By prohibiting promotional advertising of electric power, the commission has taken precisely such a step. In its expertise, the commission could have reasonably concluded that promotional advertising might tend to increase injudicious and unnecessary consumption of electrical power. Given this, the authority for the advertising ban becomes apparent.

The Commission found (J.S. App. 62a-63a) that promotional advertising of electric service at the present time will have a detrimental impact on utility rates and service. It determined that promotion of electricity would increase the cost of providing electric service, increase New York State utilities' dependence on foreign oil and increase adverse environmental impact as a result of additional generation. Insofar as conservation is concerned, the Commission found (J.S. App. 37a) that increased generation as a result of promotional advertising ". . . would aggravate the nation's already unacceptably high level of dependence on foreign sources of [oil] supply[13] and would, in addition, frustrate rather

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[13] President Carter recently stressed the importance of this nation's dependence on foreign fuel oil in his State of the Union message: "The crises in Iran and Afghanistan have dramatized a very important lesson: Our dependence on foreign oil is a clear and present danger to our national security." (*New York Times*, January 24, 1980, p. A12).

than encourage conservation efforts . . ." This finding is both reasonable and unassailable from a practical standpoint. New York's utilities are required to encourage conservation by their customers. In Central Hudson's case, 775 megawatts of its 820 megawatt capacity are oil fired.[14] Because oil-fired generation is the most expensive and therefore the last to be put on the line, each additional kilowatt hour consumed in New York means that more fuel oil (mostly imported from foreign countries) will be burned.[15]

In order to reduce electric usage, New York State electric utilities are required in accordance with the New York State Public Service Law to encourage conservation by their customers (§ 5(2)), conduct energy audits of residential premises and provide financing of certain energy conservation devices for their customers if requested (Article VII-A). Nowhere does Central Hudson dispute the desirability of or need for conservation, but it argues (Br. p. 25) contrary to the express finding of the Commission (J.S. App. 57a) that the use of electricity can be promoted consistently with reduced use of foreign fuel oil. As we have discussed above, if Central Hudson can present to the Com-

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[14] Report of Member Electric Systems of the New York Power Pool 1978, (Vol. 1, p. 343).

[15] Central Hudson argues (Br. p. 23) that the Commission made but a "faintly affirmative" claim that its advertising ban would promote conservation. If the company had read further it might not have found the claim so "faint". The Commission stated (J.S. App. 37a):

> . . .[C]onservation of energy resources remains our highest priority. We do not consider it inconsistent with the principle to implement programs that admittedly will be less than optimally effective, in a national context. It is reasonable to believe that a continued proscription of promotion of electric sales will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales.

mission an advertising program which will have the impact of conserving fuel oil along with promoting electricity and not run afoul of the other state interests considered by the Commission, particularly rate stability, the utility may do so at any time. The simple fact is that the Commission has yet to see a proposal that has these asserted benefits Central Hudson claims would result from advertising by it.[16]

Central Hudson's response (Br. pp. 24-25) to the Commission and the New York courts who found that conservation is a compelling state interest is that the ban will be ineffectual. This argument might be relevant if the utility could demonstrate that a restriction on electric promotion in New York State will not help to lessen electric growth for those whose advertising is affected (*i.e.*, New York State electric utilities).[17] Central Hudson, however, does not argue that the Commission's order will not accomplish its goal, but rather aruges that unless restrictions are instituted nationally, in other states or for other uses of energy, that the restriction will not reduce significantly energy consumption in the

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[16] The record in this case is completely devoid of utility proposals to advertise in ways that will not undermine the state interests sought to be protected by the Commission through its ban. Accordingly, this Court is merely being presented with *post hoc* rationalizations by Central Hudson's counsel in an attempt to debate the findings made by the Commission.

[17] The utility, of course, cannot make this argument because all it would prove is that promotional advertising had no impact on electric sales and is therefore useless.

United States.[18] Despite Central Hudson's effort to explain (Br. p. 25) the relevance of this argument, we still fail to understand why it is of any consequence to this case. The Commission's order extends only to New York State electric utilities who rely for oil almost exclusively on expensive and unreliable foreign sources and applies in a state where the Legislature has found (McKinney's Consolidated Laws of New York, Book 47, Pocket Part, p. 101):

> . . . In the State of New York, which consumes, to an overwhelming degree, far more energy than it produces, the need for energy conservation is of particular importance.

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[18] Central Hudson's argument that the promotional ban applies only in New York State and not nationally fails to consider that New York State in general and electric utilities in particular are more dependent on foreign oil than is the nation as a whole. The *Draft Report, New York State Energy Master Plan* published by the New York State Energy Office, August 1979, shows New York's heavy dependence on foreign oil. The report states (p. 291):

> By 1978, petroleum's share of energy sources in New York expanded to 66 percent—compared to 48 percent nationwide. Petroleum products manufactured from foreign crude oil, either at domestic or foreign refineries, accounted for 70 percent of the State's oil supplies... Nationally, 44 percent of the total oil requirement is met by foreign crude oil....

With respect to electric generation alone, the New York Power Pool (one of whose members is Central Hudson) relies on oil to generate 44.1% of its electricity while nationally only 16% of electricity is generated by oil (*Draft Report*, p. 339).

The *Draft Report* also noted (p. 292) that dependence on foreign oil has increased because many electric generating facilities were required for environmental reasons to convert from coal to oil in the 1970's. According to federal government supply figures for 1978, over 90% of the heavy residual oil used by New York's electric utilities comes from foreign sources.

The Commission's order does fulfill its purpose—to remove a source of stimulus for electric growth in New York State. An important state interest thus underlies the regulation.[19]

As an adjunct to its conservation finding, the Commission also noted (J.S. App. 57a) that promotion of electricity by utilities was at odds with the utilities' obligation to encourage conservation by their customers. Promotion would, the Commission stated, provide "totally misleading signals that conservation is unnecessary". Central Hudson (Br. pp. 30-33) miscasts the Commission's finding in suggesting that the Commission's position is "a pretty severe reflection on the public intelligence" and that the Commission believes that the public cannot be trusted to understand that a utility may both promote and urge conservation at the same time.

Central Hudson's distortion of the Commission's position is both unfortunate and does nothing to advance the decisional process in this case. The Commission's concern includes the fact that (J.S. App. 58a):

> Advertisements encouraging installation of heating equipment will frequently occur during the summer periods when air-conditioning usage is at its peak and when requests for conservation are being made.

The public, therefore, on the one hand, will be encouraged by its local utility to turn up the thermostat and accept a less comfortable temperature setting in order to save electric energy, while at the same time it would be suggesting that customers install heat pumps which provide additional air-conditioning capacity and will thus exacerbate the problem of peak load consumption (J.S. App. 58a).

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[19] Central Hudson's argument concerning the limited impact of the Commission's order is no different from arguing that an ordinance requiring parade permits in Syracuse fails to serve an important state interest because it will have no impact on parades in New York City.

Public confusion is not the issue. The public would be only too well aware of what is going on: that Central Hudson tells them to live less comfortably, while at the same time it urges development of greater usage through increased installation of electric heating equipment. Public distrust and disbelief in the necessity for sacrifice and conservation will be the logical consequence. This two-faced approach to the problem of conservation can, as the Commission found, only be detrimental to the public interest and fail to advance the important state interests of rate stability and energy conservation.

The Commission has not attempted to manipulate public opinion or shield the public from needed information. All that the order does is assure that utilities not engage in conflicting activities—urging greater usage while at the same time encouraging less usage. This case is, therefore, unlike the cases cited by Central Hudson (Br. pp. 30-33) where the state was acting to prevent the dissemination of information for fear that the public may act on it.[20]

An additional public interest fulfilled by the Commission's ban concerns the stability of electric rates in New York State. The Commission found that promotion of electric energy will

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[20] Despite Central Hudson's attempts to downplay the effectiveness of appliance dealers' advertising (*e.g.*, Br. p. 30), the fact remains that electric space heating may still be advertised in New York by other than regulated utilities (J.S. App. 59a). This clearly provides a source of information to the public about heat pumps and other mechanisms which use electric energy, while at the same time avoiding the problem of the regulated utility sending completely contrary messages to the public that conservation is needed on the one hand, but that everyone should consider using more electricity on the other. In addition, utilities remain free to provide advice to customers if they request it. The Commission's restriction relates only to direct promotional advertising by the utility itself.

encourage load growth and increase the need for new, costly generating facilities. Confronting the issue of promotional advertising and electric rates, the Commission stated (J.S. App. 57a):

> . . . The rates of electric utilities in this State continue to rise. The need for such increases derives in substantial part from pressures for increasing plant capacity to meeting growing demand. While some progress is being made to price electricity to meet its marginal cost, it is clear that the rates charged today do not cover the marginal costs of new capacity. In these circumstances, promotion of electric usage by electric utilities will simply exacerbate the pressure for spiraling prices. . . .

The rate problem discussed by the Commission is that utilities in New York State experience different costs of producing electricity at different times of the day and year. The Commission has experienced many difficulties in attempting the first steps of establishing rates that reflect varying costs and charging those rates to the customers responsible for their creation. *See, New York State Council of Retail Merchants v. Public Service Commission*, 45 N.Y.2d 661 (1978). At the present time, New York utilities do not, except in isolated instances, have rates that adequately reflect marginal cost differences and do not have economically practical time-of-day metering equipment that can measure fluctuations in usage for most customers.

Utilities are, therefore, unable to charge their customers actual costs but must charge on an average cost basis. This means that electricity cannot be priced in an economically efficient manner that maximizes the use of society's resources. It also means that peak loads are underpriced and therefore encouraged. Underpricing of peak loads leads in turn to the need for new, costly generating facilities. In other words,

existing utility rate structures send incorrect price signals to consumers. If some consumers cause increased peak load, all customers will be required to bear a portion of the increased cost burden.

The Commission is in the initial steps of attempting to structure electric rates so that the customers pay the full cost of service depending upon the time at which electricity is consumed. The Commission has announced (J.S. App. 38a) its intention to review its ban on promotional advertising at such time as the problems presented by an inadequate utility rate design no longer exist.[21]

Central Hudson would have this Court ignore the deficiencies in existing rate structures and strike down the Commission's advertising restriction as if these problems did not exist. The simple truth is, however, that the problems of inadequately structured rates do exist and will continue to exist until new, more sophisticated rate structures are developed. Central Hudson itself has a vital role in supplying data so that the Commission may set cost sensitive rates. To our

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[21] The Commission has been engaged for the last several years in developing more sophisticated rate structures. In its Case 26806—*Proceeding on Motion of the Commission as to Rate Design for Electric Corporations*, the Commission has compiled a record upon which to take initial steps to institute time-of-day pricing; however, sufficient data has not yet been accumulated nor have metering practices been developed to institute rate structures which reflect, except in limited situations, the variations in cost of providing electric service. Central Hudson's argument (Br. pp. 28-29) that the Commission can use its rate power to solve the problem created by promotion simply ignores the reality of the state of the art in rate design. If a utility does not provide proper economically efficient rates, or supply the data that permits such rates to be fixed, it has no basis for complaining that the regulatory commission has not fixed proper rates.

knowledge, the utility has been one of the less enthusiastic companies with respect to adopting marginal cost-based rates. Its own failure to contribute to a rapid solution to the rate structure problems delineated by the Commission should not be used as an excuse for striking down regulatory measures designed to ameliorate the existing rate structure deficiencies.

In addition to the arguments raised by Central Hudson, *amicus* LILCO (Br. pp. 21-23), arguing that electric space heating should be allowed to be promoted, presents a slightly different approach to this case. It did not contest, but rather accepted for the purposes of summary judgment, the Commission's findings concerning the undesirable effects of promoting electric space heating. Nevertheless, the company argued, and Judge Pratt below accepted LILCO's contention, that the ill effects of promotional advertising are not relevant to this case. Judge Pratt stated (J.S. App. 97a) that ". . . [a]lthough the public interests sought to be served by PSC are important, it is not necessary to suppress protected speech in order to achieve those ends . . . ." Judge Pratt noted that the Commission had authority to ban electric space heating and that the Commission could take this direct regulatory approach rather than inhibit the free flow of commercial information.

We agree that in the case of electric space heating the Commission could ban the use of this product by new customers. Even if the Commission did ban the use of electric space heating, however, the problems with promotion would still exist if utilities may still tout other uses of electricity. More importantly, by not banning electric space heating although prohibiting its promotion by electric utilities, the Commission leaves open an additional consumer choice as to the type of heating service customers may use. Some customers may wish to choose electric space heating, but if the Commission were to ban the product rather than limit its promotion, the Com-

mission's action would have the effect of reducing consumer choice rather than merely foreclosing promotional advertising from one source.

In addition, Judge Pratt noted (J.S. App. 94a) that the Commission had taken no direct steps to limit the use of electricity but ". . . by suppressing accurate promotional information it is attempting to avoid certain perceived detrimental effects of electric space heating . . ." We submit that this statement is totally unsupported by the record. The Commission as discussed, *supra*, is vitally concerned with the adverse consequences of promotion generally, but the only way to eliminate those problems is with a ban on advertising. Of course, the Commission could consider other measures, including rationing of electricity or a ban on installation of new electric space heating. These steps would be more detrimental to consumer choice than a ban on advertising by electric utilities. The ban's sole aim is to assure lessened growth with all of its beneficial consequences.[22]

III. The Public Service Law contains adequate standards to support the Commission's order which itself is clear, precise and confined to the state interests sought to be achieved.

Central Hudson argues (Br. pp. 33-46) that the Public Service Law as applied in this case by the New York Court of Appeals is unconstitutional because the legislature has not pro-

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[22] The Commission's concern with conservation and reliability of oil supplies has not been limited to promotional restrictions. For example, the Commission has established insulation standards for new dwellings and dwellings converting to electric heat (Case 26913—*Insulation Standards*, 16 NY PSC 702 (1976)) in order to conserve energy. Further, the Commission in the wake of the 1973 Arab oil embargo has required utilities to maintain an inventory of fuel oil sufficient for 45 days generation (Case 26200—*Fuel Oil Storage Capacity*, 13 NY PSC 1710 (1973)).

vided adequate standards for Commission action to restrict speech by public utilities. The company further argues that the Commission's order is also vague and overbroad. Neither contention is correct nor was raised below in a timely manner and accordingly may not be raised in this Court.[23] This Court has repeatedly held that it will not exercise jurisdiction to consider federal questions presented for the first time in a jurisdictional statement pursuant to 28 U.S.C. 1257(c). *Cardinale v. Louisiana*, 394 U.S. 437 (1959); *Safeway Stores, Inc. v. Oklahoma Retail Grocers*, 360 U.S. 334 at 342 n. 7 (1969); *Herndon v. Georgia*, 295 U.S. 441 (1935); and *Crowell v. Randell*, 10 Pet. 368 (1836).[24] In any event, the claims are without merit.

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[23] See Central Hudson's petition to the New York Supreme Court (J.S. 68a-73a).

[24] Central Hudson argues (Br. p. 34 n. 34) that it had raised the issues of vagueness and overbreadth of the Commission's order in the state courts. It further argues that it could not have argued that the Public Service Law lacks adequate standards until the Court of Appeals upheld the Commission's order. The first contention is misleading; the second is wrong. Central Hudson raised its claims concerning the order in an untimely fashion (for the first time in the Court of Appeals, rather than the lower courts as required, see, Cohen and Karger, *Powers of the New York Court of Appeals*, Revised Edition § § 55, 169) and the issues were not actively argued or passed upon by the state courts. Accordingly, insofar as overbreadth and vagueness are concerned, Central Hudson's untimely discussion presents problems of an inadequately developed record and lack of opportunity for state court review, problems requiring dismissal of the contentions in accord with the decisions cited in the text. Further, insofar as these claims are concerned, Central Hudson has failed to specify the information required by this Court's Rule 15(1)(d)—details of how the issues were raised and decided below.

The company's second contention, that it could not have raised the issue of lack of adequate standards below, is incorrect. The company could obviously have argued in the state courts that if they upheld the Commission's order, the law as thereby construed would have lacked adequate standards.

A. The Public Service Law.

The New York Court of Appeals determined that the Commission has statutory authority to restrict promotional advertising (J.S. App. 3a-5a). It did so after reviewing the "vast power" conferred upon the Commission by the legislature. Central Hudson correctly notes (Br. p. 36) that the Court of Appeals' determination in this regard is not a matter reviewable in this Court.

Nevertheless, it seeks to attack the Court of Appeals' decision by arguing that there are no standards in the law sufficient to allow the Commission to restrict the utility's speech. The law, however, contains specific directives (1) that the Commission encourage utilities to act so that they will preserve environmental values and conserve natural resources (Public Service Law § 5(2)), and (2) that the Commission require acts and practices as "will best promote the public interest" (Public Service Law § 66(2)). Further, all utilities are required to provide "safe and adequate service" at "just and reasonable rates" (Public Service Law § 65). Of course, it must be remembered that these standards have been implemented and refined in a regulatory context in which Central Hudson and other utilities subject to the Commission's order have operated for many years.

The Commission's order clearly fulfills these objectives and the Court of Appeals so found. The legislative standards followed by the Commission are more than adequate to pass constitutional muster, not only for economic regulation, but also for orders restricting promotional advertising in the context of regulating utility conduct. While the Public Service Law is not a statute designed to regulate speech, it is a statute designed to assure that utilities follow practices that are in the public interest.

In its attack on the Public Service Law, Central Hudson contends (Br. p. 34, caption) that the law is vague, overbroad and lacking in standards. It has briefed, however, only the claim of lack of standards.[25] The provisions of the Public Service Law quoted above and the construction given them by the New York courts result in standards far more precise than the "public interest" and "public welfare" cited by Central Hudson (Br. p. 36).[26]

This Court has held that speech may be controlled in the context of a general regulatory scheme which has no specific reference to speech. *Arnett v. Kennedy*, 416 U.S. 134 (1974); *cf. Parker v. Levy*, 417 U.S. 733 (1974). In *Arnett*, an employee had been dismissed from the Office of Economic Opportunity for violating 5 U.S.C. § 7501(a), authorizing removal for "such cause as will promote the efficiency of the service". Even though the statute did not mention speech, that broad standard was found to justify dismissal of the employee for certain of his statements. This Court rejected appellee's argument that lack of more precise standards abridged his freedom of expression. Similarly, in this case there was no need for the legislature to detail specifically the measures that the Commission may use to accomplish valid regulatory goals. [27]

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[25] We will therefore address only Central Hudson's claim of lack of standards; however, we disagree with any assertion that the law is either vague or overbroad.

[26] The company's reference to *Hannegan v. Esquire*, 327 U.S. 146 (1946), is misplaced. There the opportunity for censorship was obvious, since in deciding whether mail was entitled to a second-class permit, the Postmaster had gone outside the statutory standards and applied a "public good" standard of his own devise (327 U.S. at 149-150).

[27] Central Hudson's footnote reference (Br. p. 36) to *Arnett* fails to come to grips with the relevance of that case. Contrary to Central Hudson's assertion, there is no basis for concluding that a statute regulating employee relations is any more "narrowly targeted" than the Public Service Law which is addressed to specific utility-regulatory standards.

Central Hudson also argues (Br. p. 37) that the Court of Appeals did nothing to narrow the circumstances under which it might find an order restricting speech to be invalid. As we have discussed in Point II *supra*, there are several important state interests which justify the Commission's order. There was no need for the Court of Appeals to reject any of the grounds set forth by the Commission since they are all valid reasons for an advertising ban. The Court was obviously not required to hypothesize grounds that would fail to justify the Commission's order.

B. The Commission's Order.

Central Hudson (Br. pp. 37-40) also attacks the Commission's order on grounds of vagueness and overbreadth. We will address the arguments in that order.

The claims of vagueness and overbreadth must be viewed as distinct because they are based on separate constitutional doctrines. A challenge based on a claim of vagueness involves a lack of notice assertedly so great that it runs afoul of the procedural guarantees of due process. The wording of the challenged law must be so vague that "men of common intelligence must necessarily guess at its meaning." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). On the other hand, a claim of overbreadth under the First Amendment attacks a law for invalidating expression clearly protected by the Constitution whether or not the particular conduct or speech in the case at hand is deserving of protection. *Zwickler v. Koota*, 389 U.S. 241, 249-250 (1967); *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-433 (1963); *United States v. Robel*, 389 U.S. 258, 266 (1967); *Gooding v. Wilson*, 405 U.S. 518 (1972).

The concern of this Court respecting vagueness claims is that the inadequate notice inherent in an overly vague law will result in a "chilling effect" felt by those who would speak

but are unsure of the contours of the challenged statute. *See, Younger v. Harris*, 401 U.S. 37, 50-51 (1971); *United States v. Harriss*, 347 U.S. 612, 626 (1954); *see also, Cameron v. Johnson*, 390 U.S. 611, 616 (1968). Here, there is nothing vague about the challenged order. It does not violate the principle stated in *Connally v. General Construction Co., supra*. There is no danger that speech will be chilled. Central Hudson knows precisely what it must do—it must not engage in promoting the use of electricity through advertising. Here, there is no lack of notice to deprive Central Hudson of its due process right to fair and adequate notice.[28] The company may also seek guidance from the Commission if it has any doubt as to what constitutes promotional advertising. This Court in *C.S.C. v. Letter Carriers*, 413 U.S. 548 (1973), found "important", when rejecting a vagueness and overbreadth claim, that a person subject to a statute restricting freedom of expression (there the Hatch Act, 5 U.S.C. § 7324(a)(2)) could resolve ahead of time whether his "proposed course of conduct" would fall within the proscription of the statute as interpreted by the administering agency, 413 U.S. at 580.[29] Central Hudson has the opportunity here to have the Commission consider whether its proposed conduct comes within the prohibition of promotional advertising.[30]

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[28] The order by its terms does not allow the Commission to "pursue [its] personal predilections," as was the case in *South v. Goguen*, 415 U.S. 566 (1974), nor does it subject Central Hudson to a regulatory maze as was the case in *Kevishian v. Board of Regents*, 385 U.S. 589 (1967) (both cited by Central Hudson, Br. p. 37).

[29] Similarly in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Court noted that commercial advertisers, generally, are more likely to be able to ascertain in advance the lawfulness of proposed activity. *Id.* at 381.

[30] Central Hudson's string of hypotheticals (Br. p. 39) questioning what constitutes advertising does not show that the Commission's order is vague. If the company has serious doubts concerning any of the activities cited, it may refer the matter to the Commission. Its examples only point to the problems and speculation encountered when a party raises matters for the first time in this Court.

Central Hudson's claim that the Commission's order is defective for overbreadth is also in error. Overbreadth analysis involves two factors: first, a relaxation of the normal standing requirement so that litigants have been allowed to raise the rights of others who through the very existence of the challenged statute may have the right of expression hampered (*Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)) and second, relaxation of the normal requirement that Article III courts resolve disputes which are concrete. Thus, facts not involved in the actual litigation before the court but involving the same claimant may be hypothesized which would require a finding of unconstitutionality. *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-433 (1963). The Court's concern with overbreadth, like vagueness, in the First Amendment cases is the likelihood of a "chilling effect" on protected expression. *N.A.A.C.P. v. Button, supra; Shelton v. Tucker*, 364 U.S. 479 (1960).

The company states (Br. p. 38, n. 38) that in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), this Court, while declining to apply overbreadth analysis to "professional advertising" was addressing only the relaxed standing element of overbreadth. However, the relevant language in the *Bates* opinion is not so narrowly drawn. The Court stated (433 U.S. at 381): ". . . we decline to apply it [overbreadth] to promotional advertising, a context where it is not necessary to further its intended objective [citations omitted]." The Court therefore dismissed overbreadth analysis in promotional advertising cases in its entirety. Its reasons are fully applicable here. The Court found (433 U.S. at 381):

> . . . [S]ince advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. Moreover, concerns for uncertainty in determining the

> scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he produces and can presumably determine more readily than others whether his speech is truthful and protected.

Accordingly, Central Hudson's narrow reading of *Bates* is in error; overbreadth analysis has no place in promotional advertising cases

Even if the doctrine of overbreadth were applicable to advertising cases, the Commission's order here is not overbroad. Central Hudson's contention rests on its assertions (Br. pp. 38-39) that the order inadvertently applies to all electric promotion, not just space heating and cooling. There is no basis for the company's conclusion that the Commission meant to restrict its order to heating and cooling when the Commission expressed the need (as we have discussed in Point II) to ban all promotion in order to avoid stimulation of demand, conserve energy, keep electric prices from rising and avoid misleading signals.

Apparently Central Hudson's argument, although couched in terms of overbreadth, amounts to no more than a challenge to the wisdom of banning all promotional advertising. In this respect its argument is no more than a variation of its discussion on why the Commission's ban fails to serve compelling state interests (Central Hudson Br. pp. 22-23). The Commission order does not have the effect of banning advertising not directly related to promotion of electricity. There is no impact on Central Hudson unrelated to the order's "plainly legitimate sweep". *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)

IV. The Commission's order does not deprive Central Hudson of equal protection.

Central Hudson's final argument (Br. pp. 40-42) is that because electric promotion is prohibited and oil dealers remain free to advertise, it has been deprived of equal protection. The argument lacks merit because the Commission, whose jurisdiction extends only to electric utilities, has acted in strict accordance with its statutory authority to protect utility customers from the adverse effects of promotion of electric usage. The Court of Appeals found the Commission's order to be properly related to valid governmental interests.

It is true that this Court has examined closely government actions which impose "a selective restriction on expressive conduct . . ." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 102 (1972), cited by Central Hudson (Br. p. 42) and relied upon by *amicus* Long Island Lighting Company (Br. pp. 29-31). In this case, however, the class of businesses effected and the state interests are sufficiently related, so that the Commission's order withstands First Amendment—equal protection scrutiny. In fact, the electric utilities subject to the Commission's regulation of which Central Hudson is one, represent the entire—and only body—of would-be-promoters of electricity whose promotion would have the adverse impact on New York State electric ratepayers discussed in Point II above.[31]

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[31] As noted previously, the *Draft Report* of the New York State Energy Office shows that foreign oil provides a higher proportion of the supply of heavy, residual oil burned by utilities than lighter distillate oil used for residential home heating. Therefore, promotion by utilities raises a greater problem of aggravating New York State's dependence on foreign fuel oil than does promotion by fuel oil dealers.

Thus, the order is narrowly drawn to reach only those whose activities would create the problems the Commission seeks to control. The class is neither under, nor overinclusive.

The cases relied by Central Hudson are each significantly different from the case at hand. In *Police Department of Chicago v. Mosley, supra,* the ordinance at issue banned picketing or demonstrating near a public school during a school session, but labor picketing in front of a school involved in a labor dispute was specifically exempted. While the asserted purpose of the ordinance was to avoid disrupting school, the narrow exception carved out for labor picketing flew in the face of the intended goal. The class selected was not only unrelated to the purpose of the ordinance, but it did not even represent a reasonably graduated approach to achieving that purpose such as this Court has approved in previous cases raising equal protection claims. *Railway Express Agency v. New York,* 336 U.S. 106 (1949); *Califano v. Jobst,* 434 U.S. 47, 57 (1977). The Court in *Mosley* found that the ordinance resulted in denying a forum for the expression of some ideas while permitting the expression of one particular kind of idea without any valid rationale. Here, in contrast, both the class (electric utilities) and the restriction (promotion of electricity usage) are narrowly drawn to achieve the valid state interests in the most efficient, specific way possible.

Likewise, the statute challenged in *Williams v. Rhodes,* 393 U.S. 23 (1968) (Central Hudson, Br. p. 41), placed an "immediate and crippling impact" on the basic right to participate in the voting and election process of anyone not a member of one of the two major political parties. The law put a nearly impossible-to-meet burden on new parties to get on a ballot. The Court found (393 U.S. at 32-33) the asserted pur-

poses, political stability, guaranteeing majority rather than plurality rule, and avoidance of public confusion, were in some cases not even met by the law and taken together were simply not compelling enough to impose such a drastic impact on basic First Amendment rights. Neither a sufficient lack of relationship between means and end, nor a crippling impact on a broad range of fundamental liberties is involved here.

In *Cox v. Louisiana*, 379 U.S. 536 (1965), the Court concluded that the appellant's conviction, for *inter alia*, disturbing the peace, was invalid because the ordinance in question gave local officials "unfettered discretion" to decide who could and could not demonstrate peacefully in the streets. Here, there is neither a pattern of arbitrary enforcement nor an opportunity for unfettered discretion to which Central Hudson can point.

In seeking to show that the order is defective because it does not also include fuel oil dealers, Central Hudson (Br. p. 40) of necessity focuses only on the oil conservation rationale advanced by the Commission. Its argument ignores the other important state interests discussed in Point II, above. But even as to the oil conservation rationale it must be remembered that this Court has often held that government may move gradually toward a valid goal, regulating some and not all involved, as long as there is some rational basis for the differentiation in treatment. *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978); *Nixon v. Administrator of General Services*, 433 U.S. 425, 471 n 33 (1977); *Cleland v. National College of Business*, 435 U.S. 213 (1978); *Califano v. Jobst*, *supra*; and *Railway Express Agency v. New York*, *supra*. Nothing in the First Amendment equal protection cases indicates that this principle does not hold in the First Amendment context so long as the law itself does not violate First Amendment

freedoms (*see, San Antonio School District v. Rodriquez*, 411 U.S. 1, 61 (1973) (J. Stewart, concurring)), or extend a forum to one group while denying it to all others, (*see, Police Department of Chicago v. Mosley, Id.* at 96).

The state interests underlying the Commission's order show that imposition of advertising restrictions on electric utilities alone are rationally related to the Commission's regulating functions. The state has acted to protect the interests of electric consumers by regulating the electric utilities, the only relevant group for this purpose. There has been no attempt to favor oil dealers at the expense of utilities.[32]

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[32] Even though the Commission has restricted utilities from promotional advertising, it has not prohibited promotional advertising by others, including appliance dealers and manufacturers of electric space heating equipment. Advertisement of electric space heat *per se* has therefore not been precluded by the State since entities other than utilities remain free to promote it.

Conclusion

For the above reasons, the decision of the Court of Appeals of the State of New York should be affirmed in all respects.

Respectfully submitted,

PETER H. SCHIFF,
General Counsel,

HOWARD J. READ,
Assistant General Counsel,

JOHN W. DAX,
Staff Counsel,

Public Service Commission of
the State of New York,
Empire State Plaza,
Albany, New York 12223,
Tel. No. (518) 474-2510,

Attorneys for Appellee,
Public Service Commission of
the State of New York.

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FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF FOR APPELLANT

TELFORD TAYLOR
60 E. 42nd Street
New York, New York 10017
Tel. (212) 661-0930
Counsel for Appellant

Of Counsel:
WALTER A. BOSSERT, JR.
DAVISON W. GRANT
GOULD & WILKIE
One Wall Street
New York, New York 10005
Tel. (212) 344-5680

TAYLOR, FERENCZ & SIMON
60 E. 42nd Street
New York, New York 10017
Tel. (212) 661-0930

March, 1980

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REPLY BRIEF FOR APPELLANT

Argument

Appellee's brief[1] is based on the premise that if the Commission believes that promotional advertising by electric utilities may have consequences which run counter to policies which the Commission is authorized to foster, the Commission may prohibit the advertising (Com. Br. 20-30).[2] Of course that is wholly con-

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[1] "Com. Br." refers to the Brief for Appellee filed by the Public Service Commission of the State of New York ("Commission"); "App. Br." refers to the Brief for Appellant filed by Central Hudson Gas & Electric Corporation ("Central Hudson"); "J. S. App." refers to the Appendix to Jurisdictional Statement, a separate bound volume filed with the Jurisdictional Statement.

[2] Appellee also argues "that promotion of electric usage is contrary to the express national . . . policy of energy conservation" (Com. Br. 9)—an astonishing claim in view of the fact that the pertinent federal legislation explicitly recognizes the legitimacy of electric utility promotional advertising (App. Br. 24). See 16 U. S. C. §§ 2623(b)(5) and 2625(h).

trary to the spirit and scope of the First Amendment as declared by this Court in many decisions. Even in the absence of the First Amendment, official limitations on conduct must be reasonably related to a permissible purpose.

But when the prohibited conduct is speech, the constitutional validity of the limitation depends on much more than a rational or even an "important" purpose. Appellee's contention, that this Court has never overridden "an important state objective" while invalidating a commercial speech ban (Com. Br. 11), blandly disregards the contrary decisions of this Court (App. Br. 25).[3]

This is not the first time that officials have asserted authority to identify "good" and "bad" speech and suppress the latter sort. The claim has been the dominant theme of appellee's case throughout this proceeding. In our main brief we have endeavored to expose the frailties and fallacies of that case, and we would not now burden the Court with even a brief reply but for four matters newly raised in appellee's brief which, we believe, require response.

1. *"Promotional" vs. "Informational" Advertising.* Appellee, for the first time in this litigation, seeks to draw a distinction between "promotional" and "informational" advertising, and states that the Commission's order does not prohibit the latter

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[3] *Va. Pharmacy Bd.* v. *Va. Consumer Council,* 425 U. S. 748, 769 ("professional standards" justification previously held sufficient to support advertising bans against due process and equal protection challenges held insufficient to override First Amendment challenge); *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 94-97 (promotion of racially integrated housing an important goal but insufficient to justify ban on real estate "for sale" signs); *Bates* v. *State Bar of Arizona,* 433 U. S. 350, 368-79 (adverse effect on professionalism, misleading possibilities, impairment of administration of justice, and decline in quality of legal services, all considered and rejected as justification for ban on lawyers' advertising). In all these cases the degree and imminence of the asserted danger was questioned, but the possibility of the bad consequences was recognized and held insufficient to justify the suppression of commercial speech.

type (Com. Br. 13-14). The avowed purpose of so doing is to analogize the present case to *Ohralik v. State Bar Association*, 436 U. S. 447, in which a ban on "ambulance-chasing" was upheld, and differentiate it from *Bates v. State Bar of Arizona*, 433 U. S. 350, in which the banning of price advertising by attorneys was invalidated. The effort is ineffectual, inasmuch as it rests on the absurd premise that the lawyer-appellants in the *Bates* case were not seeking to induce the readers of their advertisement to become clients—i.e., not "promoting" their own legal services—but that they "simply provided price information so a potential client could judge whether to avail himself" of their services.[4]

In its context, however, appellee's emphasis on the promotional-informational distinction appears also intended to convey the impression that the Commission's order does not prohibit Central Hudson from publishing advertisements which provide information about such devices as heat pumps, so long as the advertisements do not in terms recommend their use.[5] While we think it plain that such a limitation on the scope of the challenged order would in no way remove or mitigate its constitutional defects, we think it equally clear that neither the

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[4] See the advertisement in question (433 U. S. at 385) and the statement in Mr. Justice Blackmun's opinion of the Court (433 U. S. at 354) that the purpose of the advertisement was "to generate the necessary flow of business, that is 'to attract clients.' "

[5] This implication is strengthened by the statement (Com. Br. 14 note 7) that Central Hudson is not "barred from informational advertising that advises the public that the utility is available to provide information on electric costs and equipment," read in conjunction with the later statement (Com. Br. 26 note 20) that " . . . utilities remain free to provide advice to customers if they request it. The Commission's restriction relates only to direct promotional advertising by the utility itself." Since the "advice" given on request may thus include the recommendation of heat pumps or other electrical usage, advertising the availability of such advice may, and would be intended to, cause an increase in electrical usage, which is the very thing that respondent elsewhere declares to be what the order is intended to prevent.

Commission's opinions supporting the order, nor the balance of appellee's brief, is consonant with such an interpretation.[6]

In conclusion on this point, it should be noted that the Commission's use of and emphasis on the promotional-informational distinction makes a shambles of its argument in defense of the order against the charge of vagueness (Com. Br. 34-35; App. Br. 39). "Promotional" and "informational" are not words of art. There is no line but rather a large over-lapping area between them; it is hard to conceive of promotional advertising which is not, to some extent, informative, and informational advertising often can be regarded as promotional.

Central Hudson has engaged in an active program of supplying information to its customers about methods of conservation, but even this program has been questioned under the Commission's ban. In Central Hudson's most recent rate case the question arose whether Central Hudson's publication in 1978 and 1979 of information about heat pumps was "promotional" or "informational". *Central Hudson Gas & Electric Corp. Rates,* Cases 27461 and 27462, —— NYPSC —— (October 24, 1979).[7] In that proceeding, the Commission's Administrative

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[6] The definition of promotional advertising in the Commission's opinion (J. S. App. 35a) is "advertising intended to stimulate the purchase of utility services", and the description of informational advertising (J. S. App. 43a) includes no mention of heat pumps or other electrically energized devices, or of any information which might be expected to increase the use of electricity. Appellee's brief, except in the portion under discussion, emphasizes the purpose of the order to ban any advertising which would lead to an increase in electrical usage (Com. Br. 9, 14-15, and 21-30).

[7] Relevant excerpts from the Commission's decision are appended hereto as Appendix A.

We are puzzled by appellee's statement (Com. Br. 13 note 6) that: "To our knowledge no utility has attempted an informational advertising campaign although it would not be prohibited by the Commission's order." In the fall of 1978, Central Hudson sponsored a "SavEnergy Fair" (open to the public and attended by rep-

[*footnote 7 continues on next page*]

Law Judge had written (with respect to the challenged literature): "As far as determining whether the heat pump advertisement and other similar advertisements are promotional or informational on their face, it is almost an impossible task. However, since Central Hudson distributes such information only upon request, it should be considered informational."[8]

"Broad prophylactic rules in the area of free speech are suspect. Precision of regulation must be the touchstone. . . ." *NAACP* v. *Button*, 371 U. S. 415, 438, quoted with approval in *Village of Schaumburg* v. *Citizens for a Better Environment*, —— U. S. ——, 48 L. W. 4162, 4166 (Feb. 20, 1980).

2. *Electric spaceheating.* Partly in response to the *amicus* brief filed by the Long Island Lighting Company (LILCO), appellee is at pains to deny "that the Commission is somehow attempting to ban electric space heating by stifling information and inhibiting consumer choices" (Com. Br. 17-18). Indeed, appellee goes further by declaring (Com. Br. 18 note 11) that: "The Commission has never taken the position that electric space

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resentatives of the Commission), at which appellant distributed a pamphlet explaining various means of saving energy in the home (e.g., insulation, heating and cooling systems operation, refrigerator use, etc.) including heat pumps, which were described as operating "as economically as any other system" and as providing "operational advantages unmatched by any other system." In the spring of 1979 Central Hudson published in local newspapers an advertisement of its new "Home Advisory Service" (established to help the homeowner "substantially reduce energy usage"), in which the heat pump was described as "increasingly popular, because it both heats and cools the home and uses about half the electricity a conventional electric installation uses for heating." In the course of the rate proceeding cited above, an intervenor contested Central Hudson's proposed advertising expense allowance, in part by criticizing these favorable mentions of heat pumps.

[8] *Central Hudson Gas & Electric Corp. Rates, supra,* and Recommended Decision by Administrative Law Judge Walter T. Moynihan (July 23, 1979) at pp. 18-19. Relevant excerpts from the Recommended Decision are appended hereto as Appendix B.

heating should be discouraged. Its sole concern is the promotion of electric usage by electric utilities."[9]

This comment is bemusing, as it is hard to see how the prohibition of advertising which promotes the use of electricity can be anything but discouraging to the use of electricity for space heating or any other purpose. Obviously, the Commission is not concerned about the promotion itself, but about its putative consequences.

More importantly, however, the Commission's disavowal of opposition to space heating starkly reveals that its order suppresses speech about an activity even though there is no "sufficient basis" to restrict that activity. The Commission's case thus rests upon the proposition—obviously untenable—that speech can be prohibited upon a lesser showing than would be required to restrict the conduct which the speech promotes.[10]

3. *New York State.* In attempting to justify its prohibition despite the fact that the federal authorities and other states do not perceive the "energy crisis" as requiring such a prohibition, the Commission argues (Com. Br. 24-25 and 38 note 31) that New York State faces a unique degree of dependence on oil for electric

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[9] As stated in our main brief, Central Hudson does not presently intend to promote electric *resistance* heating. This is due, however, to factors which may well prove temporary, and is irrelevant to our position with respect to the Commission's order which, we contend, is unconstitutional both facially and as applied, whether to electric resistance heating or to any other lawful electrical usage.

[10] The statement in the same footnote (Com. Br. 18 note 11) that the Commission "has ample statutory authority to ban electric space heating . . . but has chosen not to do so because a sufficient basis for such an action has not been shown" is oddly put. The Commission's decision-making is not supposed to be a matter of "choice"; if no basis exists for a prohibition, the Commission has no authority to impose it.

generation. However, New York State's dependence is not unique, and in any event this point is irrelevant.[11]

In the first place, the Commission did not rest its decision on the degree of New York State's dependence on foreign oil; it relied on the theory that promotion of electric usage would aggravate the *nation's* dependence on foreign oil.[12] In gauging the importance of the asserted aggravation, clearly the pertinent Congressional legislation is highly relevant, as is the action (or inaction) in other states.

In the second place, the factual support cited by appellee is unimpressive. The Commission refers (Com. Br. 24 note 18) to the *Draft Report, New York State Energy Master Plan,* New York State Energy Office, August 1979, p. 339, which estimates that oil accounted for 44.1% of the electricity generated in New York State in 1978. The Commission contrasts this 44.1% with national average of 16.1%. But other states in the country rely on oil for larger percentages of the electricity generated than New York, yet these states have not seen fit to adopt a prohibition on electric promotional advertising. According to the *EIA Report on Preliminary Power Production, Fuel Consumption and Installed Capacity Data for November 1979* (DOE/EIA/0005/11[79]) prepared by the Energy Information Agency of the Federal Department of Energy, during the month of November 1979, the states of Massachusetts, Connecticut, New Hampshire, Rhode Island, New Jersey, Virginia, Mississippi, Hawaii, Florida and California generated a greater proportion of electricity by use of oil than New York State.

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[11] It should be noted that appellee's argument, even if assumed factually valid, has no bearing on the policy chiefly relied on by appellee to support the ban—i.e., the policy favoring a marginal cost rate structure (Com. Br. 26-29). That matter is common to all jurisdictions engaged in rate regulation (App. Br. 26-30), as evidenced by Title I of the Public Utility Regulatory Policies Act of 1978, P. L. 95-617, 16 U. S. C. §§ 2611 *et seq.*

[12] J. S. App. 37a, 58a, 85a. The New York Court of Appeals referred to "state concern" (J. S. App. 14a) only in the context of the "energy crisis" generally (J. S. App. 13a-14a), and with no reference to factors peculiar to New York State.

Thirdly, the Commission's reliance on comparisons of oil usage among states and of percentages of oil from foreign sources demonstrates an inconsistent position. While the Commission perceives electric usage in terms of marginal or incremental considerations (see Com. Br. 27-28) it fails to perceive that *any* increased consumption of oil, whether for electric generation or as a direct fuel in a home oil furnace, will require increased dependence on foreign sources, since United States consumption of all petroleum products exceeds domestic production and the marginal or incremental consumption must come from foreign sources. Thus, increased oil-fired generation in a state whose percentage of electric generation by oil is identical to the national average, 16.1%, will increase dependence on foreign oil just as much as such increased consumption in New York State where the percentage is 44.1%.

Likewise, if one is concerned about reducing demand for foreign oil, the fact that the percentage of home heating oil supplied from foreign sources is lower than the percentage of oil for electric generation (Com. Br. 38 note 31) is irrelevant.[13] The marginal or incremental consumption of home heating oil must be supplied from foreign sources as long as our consumption exceeds domestic production.

In short, as far as the energy situation is concerned, the Constitution should be applied in line with Justice Cardozo's observation that it "was framed upon the theory that the peoples of the several states must sink or swim together. . . ." *Baldwin* v. *Seelig*, 294 U. S. 511, 523. Neither in the record of the

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[13] There is substantial question whether the assertion set forth at Com. Br. p. 38 note 31 can be supported. While the *Draft Report, New York State Energy Master Plan*, New York State Energy Office, August 1979, at Fig. III-10 would indicate that a higher percentage of oil for electric generation in New York State comes from foreign sources than for home heating, in the discussion of New York State prices for petroleum products, that report (Section V-E, p. 15) indicates that foreign sources account for about 90% of all heating oils, including home heating oil and residual fuel oil used for electric generation.

present case, nor available for judicial notice, is there any evidence of a shortage of oil for the generation of electricity in New York or in the nation as a whole. Neither in Congress nor in the other states is there any support for the Commission's conclusion that a prohibition on the promotion of electrical usage makes a contribution to the energy situation sufficient to justify the prohibition of speech.

4. *Prior Restraint.* At various points throughout its brief, appellee has referred to the Commission's power to interpret, or allow exemptions from, its order. The purpose of these observations, obviously, is to suggest that appellant, instead of attacking the order's breadth, should come to the Commission and ask permission to put out a particular advertisement (Com. Br. 15, last sentence of text; 17, "utilities may ask the Commission for exemptions from its advertising ban"; 22-23; 35, "Central Hudson has the opportunity here to have the Commission consider whether its proposed conduct comes within the prohibition of promotional advertising.")

The short answer to all this is that both the Commission's opinions and its brief are categorical in maintaining that no such "exemptions" will be granted if the advertisement promotes increased use of electricity, even if it would save energy in general and oil in particular—in other words that promotion of any additional use of electricity will not be tolerated even if it replaces a less efficient and more oil-dependent use. In the face of this attitude, application to the Commission would be futile.

But the vice of the Commission's assertion lies deeper, for it plainly constitutes prior restraint.[14] Such restraint may be

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[14] By prior restraint we mean the prohibition of publication without advance permission, so that the publication of unobjectionable material may be punished because prior permission was not obtained.

permissible in commercial speech cases to prevent fraud or deception.[15] *Va. Pharmacy Bd.* v. *Va. Consumer Council,* 425 U. S. 748, 771 note 24. But no such factor is involved here, for whether an advertisement is or is not truthful has nothing to do with the criteria enunciated by the Commission. Indeed, the vagueness of those criteria (*supra,* pp. 2-5)[16] renders the Commission's exemption-granting proposition especially vulnerable to the long-established rule against prior restraints. *Near* v. *Minnesota,* 283 U. S. 697; *Freedman* v. *Maryland,* 380 U. S. 51.

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[15] In this regard, the prior restraint established under the Commission's order can be contrasted with the regulation of securities under the Securities Act of 1933, as amended, where a standard to prevent deception and fraud is clearly set forth. See 15 U. S. C. § 77q.

[16] The uncertainty of these criteria may also be seen in the Commission's explicit approval of utility advertising "extolling the desirability of the [utility company's] area as a location for job-creating industry" (J. S. App. 43a note 1). For such advertising, the Commission happily casts to the winds its concern to prevent the increased use of electricity, saying (*Id.*): "Whatever its possible effects on utility rates, its benefits for the economy of New York State clearly makes such advertising a fully acceptable activity by utility companies." Thus, "boosting" New York State is made a sufficient value to override both conservation and marginal cost pricing, but First Amendment values are deemed inadequate.

Conclusion

For the reasons set forth above and in the Brief for Appellant, the relief sought by appellant should be granted.

Respectfully submitted,

TELFORD TAYLOR
60 E. 42nd Street
New York, New York 10017
Tel. (212) 661-0930
Counsel for Appellant

Of Counsel:
WALTER A. BOSSERT, JR.
DAVISON W. GRANT
GOULD & WILKIE
One Wall Street
New York, New York 10005
Tel. (212) 344-5680

TAYLOR, FERENCZ & SIMON
60 E. 42nd Street
New York, New York 10017
Tel. (212) 661-0930

March, 1980

APPENDICES

Appendix A

Excerpts from Commission Opinion and Order, *Central Hudson Gas & Electric Corp. Rates,* Cases 27461 and 27462, October 24, 1979

* * *

Advertising

The company proposed an advertising expense allowance equal to 0.09% of its proposed operating revenues, which is near the upper limit of the 0.04% to 0.1% range authorized in our *Statement of Policy on Advertising,* on the grounds that the company is relatively small and that effective use of mass media is relatively expensive in its territory. MHNO said the allowance should be restricted to 0.04% as a sanction against the company's allegedly improper advertising. Based on the company's proposed total revenue allowance, 0.09% and 0.04% would be roughly $217,000 and $101,000, respectively; under staff's proposal of about $240 million in total revenues, the respective figures would be about $205,000 and $96,000. The Judge recommends an allowance of 0.09%, and MHNO excepts.

The Judge relies on the cost considerations cited by the company as justification for allowing a percentage near the maximum. * * * He recommends that staff advise the Commission whether the company should continue to distribute an energy conservation pamphlet that includes favorable statements about heat pumps, in view of MHNO's objection that the company has failed to analyze how its load factor might be affected by widespread use of heat pumps. As long as the material is being distributed, he says, "it is almost . . . impossible" to determine whether the material is promotional rather than informational; but he decides to accept it as informational because the company provides it only on request. Otherwise, he generally rejects MHNO's substantive objections to the company's advertising.

* * * With regard to heat pumps, we are directing staff to review the challenged literature and the possibility that it requires modification.

Excerpts from Commission Opinion and Order,
Central Hudson Gas & Electric Corp. Rates,
Cases 27461 and 27462, October 24, 1979

* * *

The Commission orders

* * *

5. Staff shall review the company's mass-distributed material concerning heat pumps, for the purpose of determining and reporting to the Commission whether the material necessitates action by staff or the Commission.

* * *

Appendix B

Excerpts from Recommended Decision by Administrative Law Judge Walter T. Moynihan, *Central Hudson Gas & Electric Corp. Rates*, Cases 27461 and 27462, July 23, 1979

* * *

Advertising Expenses

Central Hudson's projected advertising expenses are set forth in the table below. Based on the company's proposed rates the advertising expenses equate to about .09% of the operating revenues. Staff reviewed the company's advertising expenses and found them reasonable.

ADVERTISING EXPENSES

12 Months Ended October 31, 1980

Informational Advertising	$154,000
Professional Services	24,000
Institutional Advertising	19,000
In-House Labor	20,000
TOTAL	$217,000

Central Hudson noted that it is a relatively small utility and it should receive an advertising allowance near the higher end of the range of .04% to .1% of operating revenues. The company argued that advertising costs per thousand are higher in the mid-Hudson region than in larger metropolitan areas. For example, the area is served by four daily and 30-odd weekly papers; by 15 radio stations—no one of which dominates any market area; and by New York City and Albany based television stations. Furthermore, the company stated that most of its advertising is devoted to safety, conservation, customer services, and information disseminated pursuant to Commission directive.

* * *

In addition, MHNO would limit advertising expenses to .04% of operating revenues as a remedial step to dissuade the

Excerpts from Recommended Decision by Administrative Law Judge Walter T. Moynihan, Central Hudson Gas & Electric Corp. Rates, *Cases 27461 and 27462, July 23, 1979*

company from placing advertisements which MHNO believes are in violation of the Commission guidelines. For example, (1) Central Hudson will supply individuals with a pamphlet on electric heat pumps which MHNO claims is unrealistically optimistic and should not be distributed, (2) the company ran newspaper advertisements stating the benefits of burning 2% sulfur oil instead of 1% in the Danskammer generators; and (3) the company distributed bill inserts setting forth the local property taxes paid by Central Hudson, which MHNO claims was an attempt to counter the growing interest in municipal power.

It is recommended that Central Hudson's claimed advertising expenses be allowed in full because they fall within the guidelines established by the Commission.[1] * * * As far as determining whether the heat pump advertisement and other similar advertisements are promotional or informational on their face, it is almost an impossible task. However, since Central Hudson distributes such information only upon request, it should be considered informational. Since the Commission's policy allows utilities to explain and justify their actions, it appears reasonable to allow advertisements such as those on the sulfur content of oil and the amount of taxes paid by the utility. Thus, these costs should be allowed.

As noted above, MHNO requested that Central Hudson be banned from distributing its pamphlet on heat pumps since MHNO believes that the pamphlet is overly optimistic and that increased penetration rates of heat pumps, backed up by resistance heat, could lead to a serious decline in a utility's load factor.

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[1] Statement of policy on Advertising and Promotional Practices of Public Utilities issued February 25, 1977.

Excerpts from Recommended Decision by Administrative Law Judge Walter T. Moynihan, Central Hudson Gas & Electric Corp. Rates, *Cases 27461 and 27462, July 23, 1979*

Central Hudson responded by stating that without electric heating, about 9% of the heating market, it would be a summer peaking company to a significant extent. At present, the company's summer and winter peaks are roughly equal and it will retain its balanced peaks to a large part because heat pump penetration is expected to increase to about 30% of the heating market over the next fifteen years.

Since this issue is extraneous to the rate case, it should not be decided here, especially in view of the fragments of evidence presented. Instead Staff should evaluate the contents of the pamphlet and report its findings with appropriate recommendations to the Commission.

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE

CAMERON F. MACRAE
Attorney for Edison Electric Institute
140 Broadway
New York, New York 10005

Of Counsel:
ROBERT L. BAUM
1111 19th Street, N.W.
Washington, D.C. 20036

LEBOEUF, LAMB, LEIBY & MACRAE
140 Broadway
New York, New York 10005

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ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE

Edison Electric Institute ("EEI") hereby submits its brief *amicus curiae* in support of appellant Central Hudson Gas & Electric Corporation ("Central Hudson") in the captioned appeal from a judgment of the Court of Appeals of the State of New York entered in this case on May 1, 1979. In accordance with this Court's Rule 42, Edison Electric Institute has received the written consent of counsel for both parties to file this brief *amicus curiae*. Copies of the consents have been filed with the Clerk.

Interest of Edison Electric Institute

Edison Electric Institute is the principal national association of electric utility companies. Its members serve 99.1 percent of all customers of the investor-owned segment of the utility industry and supply 77.1 percent of the nation's electricity. The decision of the Court of Appeals of the State of New York from which this appeal is taken concerns

a vital interest of EEI and its members – their freedom to disseminate truthful and accurate information concerning the uses and availability of electric service.

The Public Service Commission of the State of New York ("Commission") has imposed an absolute ban on all promotional advertising by electric utilities. This ban imposes a significant restriction on the utilities' freedom of speech as well as on the public's ability to gain information on a subject of vital importance to them. In a period in which consumers must make difficult choices among alternative energy sources and difficult decisions concerning the allocation of their limited resources, it is of the utmost importance that they have complete and accurate information to assist in these decisions. Truthful dissemination of information by the electric utilities provides data essential to an informed consumer choice. A complete prohibition imposed by the Commission on electric utilities, in New York, and not on their competitors who supply other forms of energy, deprives the utilities of the ability to compete adequately with those suppliers. In addition to depriving the consumer of complete information on which to rely in his selection of energy sources, EEI believes that such a complete prohibition would seriously impair the ability of the nation's electric utilities to compete with other sources of energy supply.

ARGUMENT

1. The Commission's total ban on promotional advertising concerning electric services violates the First Amendment.

The ban imposed by the Public Service Commission and upheld by the Court of Appeals of the State of New York is a total and absolute prohibition of all unsolicited communications intended to inform the public of uses of electricity. As such, the ban constitutes an unconstitutional abridgement of the utilities' freedom of speech. As Mr.

Justice Marshall wrote for a unanimous Court in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95. The order under challenge here is precisely such a prohibited restriction. It bans, under any circumstances, the unsolicited communication of information by utilities on the subject of availability and use of electric services.

Any such clearly content-based restriction is subject to a most exacting standard of review. *See Elrod v. Burns*, 427 U.S. 347 (1976); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978). Absent some compelling justification, such as a likelihood that such speech will incite "imminent lawless action," content-oriented restrictions may not stand. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *see Hess v. Indiana*, 414 U.S. 105 (1973); *United States v. O'Brien*, 391 U.S. 367 (1968). The Commission, here, has not shown any imminent public danger which would justify such a total ban on the utilities' ability to speak. At most, the Commission has asserted speculative conclusions concerning the effect of the dissemination of accurate information on energy conservation and utility rates.[1] (Appellee's Motion to Dismiss Appeal or Affirm Judgment Below, at pp. 13-18). Although the purported bases for the Commission's order may constitute laudable goals, they do not meet the standards required by this Court for such a complete abrogation of the right to speak.

Nor is this absolute ban on the dissemination of information an appropriate means to attain the goal of conservation. Other means, such as education of the public, are available to encourage conservation and do not involve such a basic infringement of First Amendment rights.

1. The Court of Appeals relied only on the promotion of conservation as a state interest sufficient to justify the ban (J.S.A. at 13a-14a). (All references to "J.S.A." are to Appellant's Appendix to Jurisdictional Statement filed with this Court on October 5, 1979.)

The Court of Appeals concluded that: "Conserving diminishing resources...constitutes a compelling justification for the ban." (J.S.A. at 14a). However, this Court has stated that regulators are not empowered to limit the free flow of information according to their "own idiosyncratic conception of the public interest." *Red Lion Broadcasting Co. v. Federal Communications Comm.*, 395 U.S. 367, 395 (1969).

Alfred E. Kahn, former Chairman of the Commission, recognized this problem when he concurred "with the greatest reluctance" with the continuation of the promotional advertising ban in February, 1977. (J.S.A. at 51a). In his separate opinion, Mr. Kahn stated that:

> "it is our responsibility also to persuade and educate consumers to make intelligent choices. But I do not conceive it as our responsibility to tell people that they may not have something for whose total marginal social costs they are willing to pay: regulators are all too prone to substitute their own judgments of what is good for people for the judgments of the people themselves." (J.S.A. at 51a.)

In the case at hand, the Commission is attempting to substitute its judgment for that of the consuming public by limiting the public's access to information on available energy supplies. But, as this Court held in *Thornhill v. Alabama*, 310 U.S. 88 (1940):

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Id.* at 102.

There may be no information more important to the consuming public in this time of uncertainty in the cost and availability of fuel supplies than accurate data concerning available sources of alternative forms of energy. The Commission's ban effectively prohibits the public from acquiring such accurate information on electric services.

The Commission's ban evidences a highly paternalistic attitude toward the public. It would seem that the Commission views consumers as unable to choose wisely in their use of energy, and, thus, it feels compelled to dictate a choice to them by means of a restriction of the information made available to them. This approach, however, is clearly impermissible under the First Amendment. Mr. Justice Marshall expressed the essence of this concept in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), writing for a unanimous Court:

> "The constitutional defect in this ordinance, however, is far more basic....The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township....As we said...in rejecting Virginia's claim that the only way it could enable its citizens to find their self-interest was to deny them information that is neither false nor misleading: 'There is...an alternative to this highly paternalistic approach. That alternative is to assume that this information is not itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them....'" *Id.* at 96-97 [Quoting from *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976)].

This language is particularly appropriate to the case at bar. The Commission has determined that consumers will not choose a course of action which is in their own or society's best interest if they are allowed free access to truthful data disseminated by the electric utilities. This approach is clearly antithetical to basic constitutional requirements and ignores the ability of the public to act intelligently on the basis of freely circulated data. As the Court wrote in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978):

> "...the First Amendment...prohibit[s] government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the free flow of commercial information." *Id.* at 783.

An evolving line of cases has made it clear that commercial speech is entitled to First Amendment protection. *Linmark Associates, supra,* involved speech of a commercial nature ("For Sale" signs posted on homeowners' lawns), as does the case at bar. In *Bigelow v. Virginia,* 421 U.S. 809 (1975), this Court stated: "[commercial] speech is not stripped of First Amendment protection merely because it appears in that form." *Id.* at 818. In *Bigelow,* the State of Virginia had attempted to prohibit dissemination of information to Virginians about the availability of abortions in New York. Despite the illegality of abortions in Virginia, this Court upheld the First Amendment rights of the advertisers.

That commercial speech is entitled to First Amendment protection was confirmed in *Virginia State Board of Pharmacy, supra,* where this Court held unconstitutional a state ban on advertising the prices of prescription drugs, concluding that a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Id.* at 773. In the present case, the Commission has "completely suppressed the dissemination of concededly truthful information" by the electric utilities because of its highly speculative fears about potential consumer actions.

The Court of Appeal's decision to uphold such a restriction is clearly erroneous. As Mr. Justice Blackmun wrote in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), a case involving advertising by lawyers:

> "[T]he prohibition of advertising serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, *we view as dubious any justification that is based on the benefits of public ignorance.*" *Id.* at 374-75 (emphasis added).

The consumer must have complete and accurate data to make informed decisions among various energy source options. No beneficial public purpose can be served by impeding the flow of such information. As Mr. Justice Blackmun wrote in *Bates, supra*:

> "The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue....Advertising, though entirely commercial, may often carry information of import to significant issues of the day....In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking." 433 U.S. at 364.

Electric utilities are in a position to provide to the public the data required for informed decision making, but, in New York, are prohibited from doing so. Their knowledge can and should be made available to current and prospective consumers who urgently need such information.

The Commission appears to believe it is justified in ordering this ban because of its extensive regulatory control over the electric utility industry. (J.S.A. at 57a-59a). Ability to control utilities' accurate and truthful speech does not, however, follow from the power to regulate other facets of the industry. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), which involved speech by the banking

industry, a heavily regulated industry, this Court flatly rejected the proposition that speech by business entities is not protected by the First Amendment. In the *Virginia Pharmacy* case, the speakers were members of the pharmacy industry over which state bodies have extensive regulatory powers. *Carey v. Population Services International*, 431 U.S. 678 (1977) and *Bates, supra*, also involved disseminators of information who were under extensive regulation. Yet, in all of these cases, this Court refused to allow regulation of the content of the industries' speech. Power to regulate rates does not imply power to regulate in the area of First Amendment freedoms.[2]

The Commission has not shown any state interest sufficiently compelling to interrupt so drastically the free flow of information on energy sources. The utilities have a right to communicate, and the public a right to obtain and evaluate, information on these matters. A ban such as that of the Commission is clearly in violation of the First Amendment and should be invalidated.

2. The order and the authorizing statute are unconstitutional under the Equal Protection Clause.

The Commission's promotional advertising ban applies only to utilities. It does not apply to non-utility suppliers of energy, such as heating oil distributors. In view of the stated purpose of the Commission's order, which is to conserve oil supplies, this discrimination against electric utilities is irrational and violates the Equal Protection clause of the Fourteenth Amendment.

This Court has painstakingly evolved an equal access principle in the area of First Amendment rights which

2. In the recent commercial speech case of *Friedman v. Rogers*, 440 U.S. 1 (1979), this Court permitted state regulation of the use of trade names only after finding that trade names are "a form of commercial speech that has no intrinsic meaning" and that the restriction had "only the most incidental effect on the content" of the regulated speech. *Id.* at 12, 16.

forbids the government from discriminating among speakers on the basis of content. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Cox v. New Hampshire*, 312 U.S. 569 (1941). In *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), Mr. Justice Marshall wrote for a unanimous Court:

> "Selective exclusions from a public forum may not be based on content alone....Guided by these principles, we have frequently condemned such discrimination among different users of the same medium for expression." 408 U.S. at 96.

In the case at hand, the Commission has not merely prevented access to a particular forum on the basis of content of speech, but has closed access to all forums to the electric utilities, resulting in the grant of a virtual informational monopoly to the proponents of other energy sources. Although it is true that electric utilities are generally the sole suppliers of electricity within a particular service area, they are faced with continual competition from suppliers of other forms of energy. The absolute ban on all promotional advertising by electric utilities imposes an unreasonable restraint on their ability to compete adequately. This grossly discriminatory scheme violates basic tenets of both Equal Protection and the First Amendment.

Moreover, the imposition of the ban on only electric utilities, among suppliers of energy, is irrational in that the stated purpose of the ban is to conserve oil. Electrical energy is produced from many sources other than oil,[3] and the Commission's ban, accepting its stated purpose, is far too broad. This Court has stated that, "[t]he Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives." *Mosley, supra,* at 101. In the case at hand, even

3. Seemingly, the Commission's prohibition bars the promotion of the use of electricity derived from sources such as wind or water power, methods which assuredly conserve fuels.

the Commission recognized that "a continued ban...may aptly be described as piecemeal conservationism since promotion of oil for use in heating or internal combustion... is not similarly proscribed." (J.S.A. at 37a.). The Commission's order is not "narrowly tailored" to its objective. Rather, it allows many aspects of oil consumption and energy use issues to be aired freely while imposing an absolute ban on the dissemination of information on one view–that of the utilities.

No rational, let alone compelling, state interest has been demonstrated by the government sufficient to justify such discrimination in restricting freedom of speech. Where fundamental freedoms are involved, a compelling state interest must be demonstrated. As Mr. Justice Powell wrote in *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), referring to the *Mosley* case:

> "The stricter standard of review was appropriately applied since the ordinance was one 'affecting First Amendment interests.' " 411 U.S. at 34, n. 75.

The ban on the fundamental freedom of speech is discriminatory and irrational and no compelling state interest has been demonstrated. The Public Service Law, as construed, and the Commission's order should be held invalid under the Equal Protection clause.

CONCLUSION

The Commission's ban on promotional advertising by electric utilities is in violation of both the Equal Protection clause and the First Amendment rights of Central Hudson and all electric utilities in the State of New York. Therefore, the decision of the Court of Appeals should be reversed and the order of the Commission declared to be unconstitutional.

Respectfully submitted,

CAMERON F. MACRAE
Attorney for Edison Electric Institute
140 Broadway
New York, New York 10005

Of Counsel:
ROBERT L. BAUM
1111 19th Street, N.W.
Washington, D.C. 20036

RONALD D. JONES
JACOB FRIEDLANDER
HOWARD S. OCKMAN
LEBOEUF, LAMB, LEIBY & MACRAE
140 Broadway
New York, New York 10005

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—v.—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF AMICUS CURIAE SUBMITTED ON BEHALF OF LONG ISLAND LIGHTING COMPANY AS PETITIONER IN 79-629

BURT NEUBORNE
40 Washington Square South
New York, New York 10012
(212) 598-2713

EDWARD M. BARRETT
General Counsel
Long Island Lighting Company
250 Old Country Road
Mineola, New York 11501

Attorneys for Amicus Curiae

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF AMICUS CURIAE SUBMITTED ON BEHALF OF LONG ISLAND LIGHTING COMPANY AS PETITIONER IN 79-629

Interest of Amicus[1]

Long Island Lighting Company (LILCO) is an investor owned company engaged in the generation and sale of electricity and the sale of natural gas to consumers

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[1] Consents of the parties to the filing of this brief *amicus curiae* have been filed with the Clerk of the Court.

in Nassau and Suffolk Counties and a small portion of Queens County in the State of New York. Prior to February, 1977, LILCO engaged in promotional advertising designed to inform consumers of the merits of electric space heating. The regulation of the New York State Public Service Commission at issue in this case imposes a flat ban on all promotional advertising calculated to increase electrical consumption. On May 6, 1977, LILCO commenced an action in the United States District Court for the Eastern District of New York seeking declaratory and injunctive relief against the Commission's flat ban on promotional advertising discussing the merits of electric home heating.[2] On March 30, 1979, the District Court ruled the Commission's total ban on promotional advertising of electric heat violated the First Amendment. Accordingly, the District Court enjoined the Commission from enforcing it against LILCO's advertisements.[3] Oral

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[2] The Federal action, *Long Island Lighting Company v. New York State Public Service Commission*, 77 Civ. 972, challenged both the ban on advertising electric home heating and a simultaneous Commission ban on "controversial" bill inserts. This appeal involves only the ban on promotional advertising. The bill insert issue is currently before this Court in *Consolidated Edison Company v. Public Service Commission*, 79-134, calendared for argument in tandem with this appeal. LILCO has filed a brief *amicus curiae* on the bill insert issue in 79-134. LILCO's petition for certiorari to the Court of Appeals for the Second Circuit prior to judgment on both the bill insert and promotional advertising issues is pending as 79-629. LILCO is prepared to submit an appropriately modified version of its briefs *amicus curiae* in 79-134 and 79-565 as its brief on the merits in 79-629 in the event certiorari is granted.

[3] The District Court upheld the constitutionality of the bill insert ban. The Court stayed its order enjoining enforcement of the ban on promotional advertising pending appellate review. A copy of the District Court's unreported opinion, its judgment, and its stay order are reproduced as an Appendix to this brief.

argument on both the promotional advertising and bill insert issues was heard by a panel of the Second Circuit on October 22, 1979.[4] After this Court noted probable jurisdiction in *Consolidated Edison Company v. New York State Public Service Commission,* 79-134, LILCO, on October 15, 1979, lodged a petition for certiorari prior to judgment with this Court seeking a writ of certiorari on both the bill insert and promotional advertising issues.[5] On November 1, 1979, this Court denied LILCO's application for expedited consideration of its petition for certiorari. All interested parties have consented to the grant of certiorari in the LILCO case and the unopposed petition is currently pending before the Court. LILCO, therefore, is directly interested in the outcome of this appeal both as a litigant in a closely related case and as a company subject to the very restriction at issue herein. Since the ban on discussing the merits of electric home heating impinges directly upon the First Amendment rights of LILCO and LILCO's customers, LILCO submits this brief *amicus curiae* in the hope that it will prove of assistance to the Court in confronting the serious First Amendment issues raised by the Commission's attempt to act as a benevolent censor. The arguments raised by LILCO in opposition to the Commission's ban are wholly supportive of the position of Central Hudson Gas & Electric Corporation in this appeal.

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[4] The appeal and cross-appeal are docketed in the Second Circuit as 79-7374 and 79-7375.

[5] LILCO's petition for certiorari is docketed in this Court as 79-629. A related petition involving only the bill insert issue has been filed by intervening environmental groups as 79-595.

Statement of the Case

LILCO is a summer peaking company. The widespread use of air conditioners in LILCO's service area has created a substantial gap between peak demand for electrical power during the summer months and a greatly reduced demand during the winter months. Thus, the peak winter demand for electricity in LILCO's service area in 1975-76 and 1976-77 was 2365 MW and 2422 MW, respectively. The peak summer demand for electricity in LILCO's service area during the same period was 3000 MW and 3065 MW, respectively. [A 238a].[6] LILCO satisfies its summer peaking demand, in small part, by purchasing additional power from other public utilities. However, it would not be feasible for LILCO to rely solely, or even primarily, upon purchased power to meet summer demand. [A 239a]. Accordingly, LILCO relies primarily upon its own generating capacity to satisfy summer peaking demand. [A 239a]. Given the decrease in winter demand, a portion of LILCO's generating capacity needed to cope with peak summer demand is not utilized during those months in which air conditioners are not in widespread use. [A 239a]. However, the fixed costs associated with owning and operating electric generating equipment remain constant despite seasonal fluctuations in the equipments' use. In order to spread the fixed costs more efficiently, LILCO has followed a consistent policy of exploring potential uses of electricity during the winter months in order to secure a more

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[6] Citations to the record are to the Appendix filed in the Second Circuit, in *Long Island Lighting Company v. New York State Public Service Commission*, 79-7374, 75. A copy of the Second Circuit Appendix has been lodged with the Court.

efficient use of its underutilized winter generating capacity. [A 239a].

A significant potential market for electricity during the winter months on Long Island is its capacity for use in residential and commercial space heating. Residents of Long Island, given its winter climate, must choose among three principal methods of space heating: (a) oil fired space heating; (b) gas fired space heating;[7] and (c) electric space heating. Accordingly, LILCO wishes to resume promotional advertising designed to inform Long Island consumers of the benefits of electric space heating.

Substantial disagreement exists over the relative energy efficiency of oil fired and electric space heating. LILCO believes that when account is taken of the widely varying efficiency levels of individually owned and maintained oil furnaces and the expenditure of fuel required to maintain home delivery of heating oil, no substantial difference exists between the quantity of oil required to generate electricity for home heating and the quantity of oil needed to provide fuel for individual oil burners. The Commission, however, argues that electric heat uses more oil than oil heat. [A 258a]. In order to facilitate a motion for summary judgment, LILCO agreed to assume, solely for the sake of argument, that the Commission is correct in assuming that electric heat uses more oil than oil heat. [A 429a-430a].

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[7] Shortages in the supply of natural gas caused the Commission to prohibit the installation of new gas fired space heaters. However, as of April 19, 1979, Long Island consumers may elect gas fired heating as an alternative to oil or electric heat. No restrictions exist on the promotion of gas or oil heat.

In addition, the parties disagree over the relative ecological consequences of oil and electric heat. LILCO believes that the atmospheric emissions produced by generating electricity for electric space heating are far less damaging to the environment than the emissions from individual oil burners and delivery trucks. The Commission harbors doubts about the ecological consequences of electric heating, especially if linked to a general rise in demand for electricity. [A 258a-59a]. Once again, however, in order to permit the District Court to proceed by summary judgment, LILCO agreed to assume, solely for the sake of argument, that oil heat is ecologically superior to electric heat. [A 429a]. Moreover, although LILCO believes that no correlation exists between the promotion of electric home heating and a general rise in the demand for unrelated electrical services, LILCO agreed to assume for the sake of argument that promotion of electric space heating may cause a general rise in the demand for electricity.[8] Finally, although LILCO has consistently cost-justified its pricing of electric home heating, LILCO agreed to assume for the sake of argument that great difficulty exists in establishing a pricing structure which reflects the marginal cost of providing additional electrical service to each consumer.[9] [A 430a].

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[8] The Commission has never sought to buttress its assertions with anything more than "undifferentiated apprehension". Although LILCO's willingness to assume the correctness of the Commission's positions for the sake of argument makes it unnecessary to reach the issue, it is clear that the Commission must bear the burden of proving the correctness of its assertions should their accuracy become relevant at a subsequent phase of this case. Cf. *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

[9] Given the predictable time of day use pattern associated with electric home heating, LILCO is able to establish a pricing struc-

Despite its apparent hostility toward electric space heating, the Commission has taken no steps to regulate its use directly.[10] Thus, adoption of electric space heating remains a lawful, unfettered consumer choice. Rather, the Commission has apparently chosen to inhibit consumer adoption of electric space heating by cutting off the major source of information concerning its merits. Whether the Commission may seek to influence behavior patterns indirectly by manipulating the flow of information available to the consuming public is the major issue posed by this appeal.

Summary of Argument

The New York State Public Service Commission may not seek to influence lawful consumer choices by controlling the flow of truthful information on their respective merits. Since the truthful information on the merits of electric space heating at issue herein is relevant to the making of a lawful consumer choice, the Commission may not absolutely prohibit its dissemination, especially when no restraints exist on the dissemination of information on the merits of competing forms of space heating.

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ture which reflects the marginal cost of delivering electrical service to the class of home heating consumers. [A331a].

[10] In the area of gas fired space heating, the Commission has not hesitated to use its direct regulation powers to restrict consumption.

Questions Presented

1. May the New York State Public Service Commission prohibit Long Island Lighting Company from engaging in truthful promotional advertising designed to inform consumers of the benefits of electric space heating?

2. May New York prohibit truthful promotional advertising of electric space heating while permitting unlimited promotional advertising of oil fired space heating?

ARGUMENT

I.

The Commission's ban on truthful advertising designed to inform consumers of the benefits of electric space heating violates the First Amendment.

In adopting a paternalistic approach to LILCO's speech, the Commission has violated the First Amendment. Instead of respecting the basic notion that, whenever possible, the flow of truthful information should be encouraged in a free society to permit affected individuals to exercise an informed choice among lawful alternatives, the Commission has chosen to stifle and manipulate the flow of information relating to electric space heating in an attempt to inhibit

consumers from selecting what the Commission apparently believes is a socially undesirable form of space heating.

The Commission does not attempt to justify its ban on LILCO's electric home heating advertisements on the ground that they are false, deceptive or misleading. Nor does the Commission claim that LILCO may be unable to supply adequate service to existing as well as projected customers.[11] Finally, the Commission does not argue that the adoption of electric home heating is unlawful or in any way legally questionable. Instead,

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[11] The ban on advertising calculated to increase the use of electricity dates from the Arab oil embargo and was initially imposed on December 6, 1973. The Commission's initial justification for the advertising ban was that the oil shortage created by the Arab embargo rendered it questionable whether existing power commitments could be met. Accordingly, all agreed that new commitments should be avoided. With the end of the embargo and the resumption of adequate oil supplies (albeit at increased cost), to say nothing of the increased use of coal and nuclear power to generate electricity, the basis for the Commission's 1973 ban on advertising has disappeared. However, despite repeated requests to relax the ban to permit advertisements calculated to increase off-peak usage, the Commission clung to its 1973 position. Whether the emergency created by the 1973 oil embargo justified the advertising ban is a close question. Serious doubt exists whether the suppression of speech (as opposed to direct regulation of energy consumption) was a lawful method of coping with the embargo. However, whatever doubtful validity the advertising ban may have enjoyed during the emergency, its current validity cannot be supported on similar grounds. Indeed, the Commission quite candidly does not attempt to justify the ban as an emergency measure made necessary by an oil shortage.

Of course, consumers who do not choose electric heat must adopt an alternative energy source to provide necessary heating during Long Island's winter. Since oil heat is also dependent upon foreign oil, a restriction on electric heat merely shifts the demand for foreign oil, it does not eliminate it.

the Commission seeks to justify its refusal to relax the ban on advertising electric heating solely on the ground that, in the view of the Commission, society will be better served if persons elect to heat their homes by oil rather than by electricity.

The Commission's view that oil heating is societally preferable to electric heating is based, first, on the Commission's assumption that electric home heating consumes more oil (in order to generate the necessary electricity) than oil fired space heating and, second, on the Commission's fears that generation of additional electricity for home heating purposes may produce unspecified adverse ecological consequences.

Although it is unnecessary to a resolution of the basic First Amendment issue posed by the Commission's ban, the Commission's assumptions about the relative consumption of oil in electric and oil heating are open to serious question.[12] Moreover, the Commis-

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[12] The Commission's principal justification for continuing a ban on electric home heating advertisements is that accurate advertisements will induce a number of consumers to choose electric heat instead of oil heat. The Commission believes that such a consumer choice would be unfortunate because it believes that more oil is consumed in generating electricity for home heating than in burning oil directly in oil heating. However, the Commission's assumption about the efficiency of individual oil heating systems in private homes is based on hopelessly inadequate data. Moreover, the Commission has failed to consider the expenditure of oil inherent in providing periodic truck delivery of oil to individual consumers using oil heat. In fact, when realistic account is taken of (1) the true efficiency levels of home oil heating systems of varying age currently in use and (2) the expenditure of oil needed to provide periodic delivery to oil heat systems, virtually no difference exists between the relative consumption of oil to provide electric and oil heat.

sion's assumption about the relative ecological desirability of electric and oil heat is clearly incorrect.[13]

However, even if one assumes that the Commission is justified in believing that electric heat uses more oil and is ecologically inferior to oil heat, the Commission cannot seek to manipulate consumers into the "right" choice by artificially restricting their receipt of information. Apparently, the Commission believes that by cutting off the flow of truthful information about electric home heating (which it considers socially undesirable), the Commission can affect the behavior pattern of New Yorkers in a manner which the Commission (no doubt sincerely) believes is best for them. However, Americans are not rats in a B.F. Skinner experiment.[14] Unlike less fortunate peoples, Americans cannot be manipulated by the State (even a beneficient State) into behavior patterns which the State believes are best for them by the device of varying the informational stimuli to which they are exposed.

Under our system, if the government fears that adverse consequences may flow from a given act, it may

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[13] A subsidiary factor in the Commission's decision to ban electric heat advertising was the assertion of ecological damage (primarily thermal) which would be caused by the increased generation of electricity. However, the Commission utterly failed to consider the ecological consequences of the pollution caused by the burning of oil in inefficient home and apartment heating systems and the obvious ecological consequences of the widespread use of oil delivery trucks. Whatever else one may say about the relative merits of electric and oil heating, it is difficult to argue with the clear ecological superiority enjoyed by electric heat.

[14] Skinner's theories of behavior modification by the adroit manipulation of stimuli are described in Skinner, *Beyond Freedom and Dignity* and Skinner, *Walden II*.

seek to inhibit the performance of that act in two ways: persuasion and deterrence. First, the government may publicize its concern. Thus, in this case, if the Commission believes that adverse consequences will flow to society from the use of electric heat, the Commission may publicize its concern in the expectation that if the adverse consequences are perceived, the disfavored act will not take place. Second, if the adverse consequences are sufficiently serious, the government may seek to outlaw or otherwise penalize the performance of the disfavored act.

Thus, in this case, if the Commission believes that adverse consequences flow to society from the use of electric heat, it may publicize those consequences. Moreover, if the consequences are sufficiently serious, the Commission may seek to place direct restrictions upon its use.[15] The Commission, however, elected neither persuasion nor deterrence. Instead, the Commission seeks to inhibit the performance of what it perceives as a disfavored act (the adoption of electric heating) not by providing additional information about its alleged consequences (persuasion); not by seeking to outlaw or otherwise penalize its use (deterrence), but by artificially restricting and manipulating the flow of accurate information about it (deception). In adopting deception as a behavior control technique, the Commission has ignored the First Amendment.

In *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977) and *Carey v. Population Services, Inc.,* 431 U.S. 678 (1977), this Court invalidated

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[15] The Commission has engaged in such direct regulation in the gas fired space heating area.

two similar attempts by well meaning public officials to influence behavior by controlling speech.

In *Linmark*, the Township of Willingboro, justifiably concerned over panic selling and in an effort to maintain integrated housing, forbade sellers from placing "For Sale" signs on their property. No restrictions were imposed on alternative sources of dissemination, such as newspaper advertisements. Willingboro attempted to justify the limited suppression of speech by arguing that adverse consequences (panic selling and the disintegration of integrated neighborhoods) would flow from the speech in question. Mr. Justice Marshall, writing for a unanimous Court, rejected the notion that government may regulate the flow of accurate information merely because it believes that such information might have "detrimental" social consequences. As Justice Marshall noted:

> "After *Virginia Pharmacy* it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is 'detrimental.'" 431 U.S. at 92, n.6.

In words particularly appropriate to the case at bar, Mr. Justice Marshall held:

> "The constitutional defect in this ordinance . . . is . . . basic. The Township Council here, like the Virginia Assembly in *Virginia Pharmacy*, acted to prevent its residents from obtaining certain information. . . . The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners self-interest and the corporate interest of the

welfare", the Commission has chosen to ban the speech. As Justice Marshall's decision for a unanimous Court in *Linmark* demonstrates, fifty years of First Amendment doctrine protects us from the renascence of the discredited notion that speech may be suppressed merely because the State is unhappy with its possible consequences. Compare, *Gitlow v. New York*, 268 U.S. 652 (1925) with *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Of course, until relatively recently, the "commercial" nature of the speech at issue herein would have raised a serious question as to its coverage under the First Amendment. E.g., *Valentine v. Chrestensen*, 316 U.S. 52 (1942).[19] However, in a series of cases, this Court has unequivocally rejected the notion that commercial speech is beyond the pale of First Amendment protection.[20]

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[19] The application of the "old" commercial speech exception to the First Amendment may be traced through *Semmler v. Dental Examiners*, 294 U.S. 608 (1935) (price advertising by dentists not protected); *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (commercial leafletting not protected); *Williamson v. Lee Optical Company*, 348 U.S. 483 (1955) (price advertising not protected); *Head v. New Mexico Board*, 374 U.S. 424 (1963).

[20] The rise of the "new" commercial speech doctrine in the Supreme Court may be traced through *Bigelow v. Virginia*, 421 U.S. 809 (1975) (commercial abortion ad in newspaper protected); *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council*, 425 U.S. 748 (1976) (price advertising for prescription drugs protected); *California State Board of Pharmacy v. Terry*, 395 F. Supp. 94 (N.D. Cal. 1976) aff'd 426 U.S. 913 (1977) (same); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (For Sale signs on residential property protected). *Carey v. Population Services, Inc.*, 431 U.S. 678 (1977) (contraceptive advertising protected); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (lawyer advertising protected); *First National Bank of Bos-*

In *Bigelow v. Virginia*, 421 U.S. 809 (1975), this Court ruled that a commercial advertisement in a Virginia newspaper informing Virginians of the existence of abortion clinics lawful in New York (but unlawful in Virginia) was protected by the First Amendment. The Court explicitly rejected Virginia's argument that it possessed the power to suppress accurate information about a matter which Virginia deemed unlawful. It seems an *a fortiori* proposition that the Commission may not suppress accurate commercial information about a perfectly lawful consumer choice.

In *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council*, 425 U.S. 748 (1976), this Court invalidated Virginia's ban on price advertising of prescription drugs. The Court explicitly rejected Virginia's argument that it possessed the power to suppress accurate commercial information merely because a legitimate governmental interest would be advanced by suppression. If Virginia lacked power to suppress accurate commercial information in order to insure the professional integrity of its pharmacists, it seems an *a fortiori* proposition that the Commission may not suppress accurate commercial information to further amorphous and highly questionable interests of conservation and ecology.

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ton v. Bellotti, 435 U.S. 765 (1978) (corporate speech entitled to First Amendment protection). See also, *Friedman v. Rogers*, 440 U.S. 1 (1979) (prohibition on trade names valid because of capacity to mislead). See also, *Metpath, Inc. v. Imperato*, 450 F. Supp. 115, 117 (S.D.N.Y. 1978).

In *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977), this Court invalidated a local ban on "For Sale" signs on residential property. If New Jersey lacked power to suppress accurate commercial information in order to maintain the stability of an integrated residential neighborhood, it seems an *a fortiori* proposition that the Commission may not suppress accurate commercial information to advance its highly debatable views on oil conservation and ecology.

In *Carey v. Population Services, Inc.,* 431 U.S. 678 (1977), this Court invalidated New York's ban on the advertising of contraceptives. If New York lacked power to suppress accurate commercial information in order to deter sexual promiscuity among teenagers, it seems an *a fortiori* proposition that the Commission may not suppress accurate commercial information which is likely to lead to nothing more serious than the installation of electric home heating.

In *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), this Court invalidated Arizona's ban of price and service advertising by lawyers. If lawyers are constitutionally permitted to disseminate accurate commercial information pertaining to fees and services, it seems an *a fortiori* proposition that LILCO may disseminate similarly accurate information pertaining to its fees and services.

A common theme linking *Bigelow, Virginia Pharmacy, Linmark Associates, Carey* and *Bates* is an increased concern with the right of the public to receive all available information relevant to the making of an informed choice among equally lawful courses of conduct. Thus, in protecting commercial speech, this Court recognized, once again, the right to know as a corollary

of the right to speak.[21] Since the Commission's absolute ban prevents lawful, accurate information from reaching the consuming public, it violates "the right to know."

Of course, LILCO does not suggest that the Commission is without power to oversee a utility's commercial communications. First, LILCO does not challenge the Commission's power to establish a reasonable cost-allocation formula for commercial speech for use in rate-making computations.[22] Second, LILCO does not challenge the Commission's power and responsibility to guard against false, misleading or deceptive advertising by public utilities. See generally, Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising,* 90 Harv. L. Rev. 661 (1977). See also, *Friedman v. Rogers,* 440 U.S. 1 (1979). Third, plaintiff does not challenge the power of the Commission to regulate

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[21] The recognition that the First Amendment protects the right to receive information as well as the right to disseminate it dates from *Martin v. Struthers,* 319 U.S. 141 (1943), when this Court invalidated an ordinance outlawing house to house canvassing because it interfered with the right of a householder to receive information. See also, *Thomas v. Collins,* 323 U.S. 516 (1945). The first explicit recognition of a "right to know" was in *Lamont v. Postmaster General,* 381 U.S. 301 (1965) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren market place of ideas that had only sellers and no buyers." *Id.* at 308 (Mr. Justice Brennan concurring). Most recently, in *Friedman v. Rogers,* 440 U.S. 1 (1979), this Court upheld a Texas ban on trade names by optometrists since the use of trade names often caused consumer confusion.

[22] The effect of such a cost allocation formula is to place a ceiling on the amounts which a utility may expend on advertising and include in its rate-making base.

Statement of the Case

LILCO is a summer peaking company. The widespread use of air conditioners in LILCO's service area has created a substantial gap between peak demand for electrical power during the summer months and a greatly reduced demand during the winter months. Thus, the peak winter demand for electricity in LILCO's service area in 1975-76 and 1976-77 was 2365 MW and 2422 MW, respectively. The peak summer demand for electricity in LILCO's service area during the same period was 3000 MW and 3065 MW, respectively. [A 238a].[6] LILCO satisfies its summer peaking demand, in small part, by purchasing additional power from other public utilities. However, it would not be feasible for LILCO to rely solely, or even primarily, upon purchased power to meet summer demand. [A 239a]. Accordingly, LILCO relies primarily upon its own generating capacity to satisfy summer peaking demand. [A 239a]. Given the decrease in winter demand, a portion of LILCO's generating capacity needed to cope with peak summer demand is not utilized during those months in which air conditioners are not in widespread use. [A 239a]. However, the fixed costs associated with owning and operating electric generating equipment remain constant despite seasonal fluctuations in the equipments' use. In order to spread the fixed costs more efficiently, LILCO has followed a consistent policy of exploring potential uses of electricity during the winter months in order to secure a more

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[6] Citations to the record are to the Appendix filed in the Second Circuit, in *Long Island Lighting Company v. New York State Public Service Commission*, 79-7374, 75. A copy of the Second Circuit Appendix has been lodged with the Court.

efficient use of its underutilized winter generating capacity. [A 239a].

A significant potential market for electricity during the winter months on Long Island is its capacity for use in residential and commercial space heating. Residents of Long Island, given its winter climate, must choose among three principal methods of space heating: (a) oil fired space heating; (b) gas fired space heating;[7] and (c) electric space heating. Accordingly, LILCO wishes to resume promotional advertising designed to inform Long Island consumers of the benefits of electric space heating.

Substantial disagreement exists over the relative energy efficiency of oil fired and electric space heating. LILCO believes that when account is taken of the widely varying efficiency levels of individually owned and maintained oil furnaces and the expenditure of fuel required to maintain home delivery of heating oil, no substantial difference exists between the quantity of oil required to generate electricity for home heating and the quantity of oil needed to provide fuel for individual oil burners. The Commission, however, argues that electric heat uses more oil than oil heat. [A 258a]. In order to facilitate a motion for summary judgment, LILCO agreed to assume, solely for the sake of argument, that the Commission is correct in assuming that electric heat uses more oil than oil heat. [A 429a-430a].

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[7] Shortages in the supply of natural gas caused the Commission to prohibit the installation of new gas fired space heaters. However, as of April 19, 1979, Long Island consumers may elect gas fired heating as an alternative to oil or electric heat. No restrictions exist on the promotion of gas or oil heat.

In addition, the parties disagree over the relative ecological consequences of oil and electric heat. LILCO believes that the atmospheric emissions produced by generating electricity for electric space heating are far less damaging to the environment than the emissions from individual oil burners and delivery trucks. The Commission harbors doubts about the ecological consequences of electric heating, especially if linked to a general rise in demand for electricity. [A 258a-59a]. Once again, however, in order to permit the District Court to proceed by summary judgment, LILCO agreed to assume, solely for the sake of argument, that oil heat is ecologically superior to electric heat. [A 429a]. Moreover, although LILCO believes that no correlation exists between the promotion of electric home heating and a general rise in the demand for unrelated electrical services, LILCO agreed to assume for the sake of argument that promotion of electric space heating may cause a general rise in the demand for electricity.[8] Finally, although LILCO has consistently cost-justified its pricing of electric home heating, LILCO agreed to assume for the sake of argument that great difficulty exists in establishing a pricing structure which reflects the marginal cost of providing additional electrical service to each consumer.[9] [A 430a].

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Summary of Argument

The New York State Public Service Commission may not seek to influence lawful consumer choices by controlling the flow of truthful information on their respective merits. Since the truthful information on the merits of electric space heating at issue herein is relevant to the making of a lawful consumer choice, the Commission may not absolutely prohibit its dissemination, especially when no restraints exist on the dissemination of information on the merits of competing forms of space heating.

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ture which reflects the marginal cost of delivering electrical service to the class of home heating consumers. [A331a].

[10] In the area of gas fired space heating, the Commission has not hesitated to use its direct regulation powers to restrict consumption.

Questions Presented

1. May the New York State Public Service Commission prohibit Long Island Lighting Company from engaging in truthful promotional advertising designed to inform consumers of the benefits of electric space heating?

2. May New York prohibit truthful promotional advertising of electric space heating while permitting unlimited promotional advertising of oil fired space heating?

ARGUMENT

I.

The Commission's ban on truthful advertising designed to inform consumers of the benefits of electric space heating violates the First Amendment.

In adopting a paternalistic approach to LILCO's speech, the Commission has violated the First Amendment. Instead of respecting the basic notion that, whenever possible, the flow of truthful information should be encouraged in a free society to permit affected individuals to exercise an informed choice among lawful alternatives, the Commission has chosen to stifle and manipulate the flow of information relating to electric space heating in an attempt to inhibit

consumers from selecting what the Commission apparently believes is a socially undesirable form of space heating.

The Commission does not attempt to justify its ban on LILCO's electric home heating advertisements on the ground that they are false, deceptive or misleading. Nor does the Commission claim that LILCO may be unable to supply adequate service to existing as well as projected customers.[11] Finally, the Commission does not argue that the adoption of electric home heating is unlawful or in any way legally questionable. Instead,

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[11] The ban on advertising calculated to increase the use of electricity dates from the Arab oil embargo and was initially imposed on December 6, 1973. The Commission's initial justification for the advertising ban was that the oil shortage created by the Arab embargo rendered it questionable whether existing power commitments could be met. Accordingly, all agreed that new commitments should be avoided. With the end of the embargo and the resumption of adequate oil supplies (albeit at increased cost), to say nothing of the increased use of coal and nuclear power to generate electricity, the basis for the Commission's 1973 ban on advertising has disappeared. However, despite repeated requests to relax the ban to permit advertisements calculated to increase off-peak usage, the Commission clung to its 1973 position. Whether the emergency created by the 1973 oil embargo justified the advertising ban is a close question. Serious doubt exists whether the suppression of speech (as opposed to direct regulation of energy consumption) was a lawful method of coping with the embargo. However, whatever doubtful validity the advertising ban may have enjoyed during the emergency, its current validity cannot be supported on similar grounds. Indeed, the Commission quite candidly does not attempt to justify the ban as an emergency measure made necessary by an oil shortage.

Of course, consumers who do not choose electric heat must adopt an alternative energy source to provide necessary heating during Long Island's winter. Since oil heat is also dependent upon foreign oil, a restriction on electric heat merely shifts the demand for foreign oil, it does not eliminate it.

the Commission seeks to justify its refusal to relax the ban on advertising electric heating solely on the ground that, in the view of the Commission, society will be better served if persons elect to heat their homes by oil rather than by electricity.

The Commission's view that oil heating is societally preferable to electric heating is based, first, on the Commission's assumption that electric home heating consumes more oil (in order to generate the necessary electricity) than oil fired space heating and, second, on the Commission's fears that generation of additional electricity for home heating purposes may produce unspecified adverse ecological consequences.

Although it is unnecessary to a resolution of the basic First Amendment issue posed by the Commission's ban, the Commission's assumptions about the relative consumption of oil in electric and oil heating are open to serious question.[12] Moreover, the Commis-

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[12] The Commission's principal justification for continuing a ban on electric home heating advertisements is that accurate advertisements will induce a number of consumers to choose electric heat instead of oil heat. The Commission believes that such a consumer choice would be unfortunate because it believes that more oil is consumed in generating electricity for home heating than in burning oil directly in oil heating. However, the Commission's assumption about the efficiency of individual oil heating systems in private homes is based on hopelessly inadequate data. Moreover, the Commission has failed to consider the expenditure of oil inherent in providing periodic truck delivery of oil to individual consumers using oil heat. In fact, when realistic account is taken of (1) the true efficiency levels of home oil heating systems of varying age currently in use and (2) the expenditure of oil needed to provide periodic delivery to oil heat systems, virtually no difference exists between the relative consumption of oil to provide electric and oil heat.

sion's assumption about the relative ecological desirability of electric and oil heat is clearly incorrect.[13]

However, even if one assumes that the Commission is justified in believing that electric heat uses more oil and is ecologically inferior to oil heat, the Commission cannot seek to manipulate consumers into the "right" choice by artificially restricting their receipt of information. Apparently, the Commission believes that by cutting off the flow of truthful information about electric home heating (which it considers socially undesirable), the Commission can affect the behavior pattern of New Yorkers in a manner which the Commission (no doubt sincerely) believes is best for them. However, Americans are not rats in a B.F. Skinner experiment.[14] Unlike less fortunate peoples, Americans cannot be manipulated by the State (even a beneficient State) into behavior patterns which the State believes are best for them by the device of varying the informational stimuli to which they are exposed.

Under our system, if the government fears that adverse consequences may flow from a given act, it may

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Thus, in this case, if the Commission believes that adverse consequences flow to society from the use of electric heat, it may publicize those consequences. Moreover, if the consequences are sufficiently serious, the Commission may seek to place direct restrictions upon its use.[15] The Commission, however, elected neither persuasion nor deterrence. Instead, the Commission seeks to inhibit the performance of what it perceives as a disfavored act (the adoption of electric heating) not by providing additional information about its alleged consequences (persuasion); not by seeking to outlaw or otherwise penalize its use (deterrence), but by artificially restricting and manipulating the flow of accurate information about it (deception). In adopting deception as a behavior control technique, the Commission has ignored the First Amendment.

In *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977) and *Carey v. Population Services, Inc.,* 431 U.S. 678 (1977), this Court invalidated

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> "After *Virginia Pharmacy* it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is 'detrimental.'" 431 U.S. at 92, n.6.

In words particularly appropriate to the case at bar, Mr. Justice Marshall held:

> "The constitutional defect in this ordinance . . . is . . . basic. The Township Council here, like the Virginia Assembly in *Virginia Pharmacy,* acted to prevent its residents from obtaining certain information. . . . The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners self-interest and the corporate interest of the

township. . . . As we said . . . in rejecting Virginia's claim that the only way it could enable its citizens to find their self-interest was to deny them information that is neither false nor misleading:

"There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that information is not itself harmful, that people will perceive their own best interest if only they are well enough informed, and that the best means to that end is to open channels of communication rather than to close them. . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of misuse if it is freely available, that the First Amendment makes for us." [Quoting from *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council, Inc.*, 425 U.S. 748 (1976) at 770]. 431 U.S. at 96-97.

In *Carey v. Population Services, Inc.*, 431 U.S. 678 (1977), this Court invalidated a prohibition on the advertising of contraceptives in New York State. As in the instant case, New York authorities sought to justify the suppression of accurate information concerning contraceptives on the ground that adverse social consequences (sexual promiscuity, especially among teengers) would result from the advertisement of contraceptives.

In *Carey*, as in *Linmark*, the Court refused to tolerate the suppression of accurate information as a permissible means of regulating public behavior. Thus, if

the Commission is correct in believing the adoption of electric heat is a social evil, "the remedy to be applied is more speech, not enforced silence." *Whitney v. California,* 274 U.S. 357, 372 (1927) (Brandeis, J. concurring).

A moment's reflection places the Commission's purported justification for suppressing electric home heating advertisements in historical perspective. Prior to the initial enunciation of modern First Amendment doctrine by Justices Holmes and Brandeis during the 1920's,[16] the analysis of First Amendment issues was dominated by what has come to be known as the "bad tendency" test.[17] Under the "bad tendency" test, the State was empowered to outlaw "utterances inimical to the public welfare".[18] Since the Commission has determined that the dissemination of accurate information concerning electric home heating will have a "bad tendency" to lead to consequences "inimical to the public

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[16] The emergence of a modern vision of the First Amendment may be traced through *Schenck v. United States,* 249 U.S. 47 (1919); *Abrams v. United States,* 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); *Gitlow v. New York,* 268 U.S. 652, 672 (1925) (Holmes, J., dissenting); *Whitney v. California,* 274 U.S. 357, 372 (1927) (Brandeis, J., concurring). See also, *Fiske v. Kansas,* 274 U.S. 380 (1927) (apparently the first reversal of a state conviction on what would today be viewed as classic First Amendment analysis).

[17] Dorsen, Bender, and Neuborne, *Political and Civil Rights in the United States,* Vol. I (4th ed.) at 57.

[18] *Gitlow v. New York,* 268 U.S. 652 (1925) at 667. Such a broad power rendered First Amendment protection non-existent as a practical matter. Indeed, use of a bad tendency analysis is the characteristic device by which the ringing affirmations of free speech rights which routinely appear in totalitarian constitutions are stripped of practical vitality.

welfare", the Commission has chosen to ban the speech. As Justice Marshall's decision for a unanimous Court in *Linmark* demonstrates, fifty years of First Amendment doctrine protects us from the renascence of the discredited notion that speech may be suppressed merely because the State is unhappy with its possible consequences. Compare, *Gitlow v. New York*, 268 U.S. 652 (1925) with *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Of course, until relatively recently, the "commercial" nature of the speech at issue herein would have raised a serious question as to its coverage under the First Amendment. E.g., *Valentine v. Chrestensen*, 316 U.S. 52 (1942).[19] However, in a series of cases, this Court has unequivocally rejected the notion that commercial speech is beyond the pale of First Amendment protection.[20]

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[19] The application of the "old" commercial speech exception to the First Amendment may be traced through *Semmler v. Dental Examiners*, 294 U.S. 608 (1935) (price advertising by dentists not protected); *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (commercial leafletting not protected); *Williamson v. Lee Optical Company*, 348 U.S. 483 (1955) (price advertising not protected); *Head v. New Mexico Board*, 374 U.S. 424 (1963).

[20] The rise of the "new" commercial speech doctrine in the Supreme Court may be traced through *Bigelow v. Virginia*, 421 U.S. 809 (1975) (commercial abortion ad in newspaper protected); *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council*, 425 U.S. 748 (1976) (price advertising for prescription drugs protected); *California State Board of Pharmacy v. Terry*, 395 F. Supp. 94 (N.D. Cal. 1976) aff'd 426 U.S. 913 (1977) (same); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (For Sale signs on residential property protected). *Carey v. Population Services, Inc.*, 431 U.S. 678 (1977) (contraceptive advertising protected); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (lawyer advertising protected); *First National Bank of Bos-*

In *Bigelow v. Virginia,* 421 U.S. 809 (1975), this Court ruled that a commercial advertisement in a Virginia newspaper informing Virginians of the existence of abortion clinics lawful in New York (but unlawful in Virginia) was protected by the First Amendment. The Court explicitly rejected Virginia's argument that it possessed the power to suppress accurate information about a matter which Virginia deemed unlawful. It seems an *a fortiori* proposition that the Commission may not suppress accurate commercial information about a perfectly lawful consumer choice.

In *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council,* 425 U.S. 748 (1976), this Court invalidated Virginia's ban on price advertising of prescription drugs. The Court explicitly rejected Virginia's argument that it possessed the power to suppress accurate commercial information merely because a legitimate governmental interest would be advanced by suppression. If Virginia lacked power to suppress accurate commercial information in order to insure the professional integrity of its pharmacists, it seems an *a fortiori* proposition that the Commission may not suppress accurate commercial information to further amorphous and highly questionable interests of conservation and ecology.

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ton v. Bellotti, 435 U.S. 765 (1978) (corporate speech entitled to First Amendment protection). See also, *Friedman v. Rogers,* 440 U.S. 1 (1979) (prohibition on trade names valid because of capacity to mislead). See also, *Metpath, Inc. v. Imperato,* 450 F. Supp. 115, 117 (S.D.N.Y. 1978).

In *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977), this Court invalidated a local ban on "For Sale" signs on residential property. If New Jersey lacked power to suppress accurate commercial information in order to maintain the stability of an integrated residential neighborhood, it seems an *a fortiori* proposition that the Commission may not suppress accurate commercial information to advance its highly debatable views on oil conservation and ecology.

In *Carey v. Population Services, Inc.,* 431 U.S. 678 (1977), this Court invalidated New York's ban on the advertising of contraceptives. If New York lacked power to suppress accurate commercial information in order to deter sexual promiscuity among teenagers, it seems an *a fortiori* proposition that the Commission may not suppress accurate commercial information which is likely to lead to nothing more serious than the installation of electric home heating.

In *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), this Court invalidated Arizona's ban of price and service advertising by lawyers. If lawyers are constitutionally permitted to disseminate accurate commercial information pertaining to fees and services, it seems an *a fortiori* proposition that LILCO may disseminate similarly accurate information pertaining to its fees and services.

A common theme linking *Bigelow, Virginia Pharmacy, Linmark Associates, Carey* and *Bates* is an increased concern with the right of the public to receive all available information relevant to the making of an informed choice among equally lawful courses of conduct. Thus, in protecting commercial speech, this Court recognized, once again, the right to know as a corollary

of the right to speak.[21] Since the Commission's absolute ban prevents lawful, accurate information from reaching the consuming public, it violates "the right to know."

Of course, LILCO does not suggest that the Commission is without power to oversee a utility's commercial communications. First, LILCO does not challenge the Commission's power to establish a reasonable cost-allocation formula for commercial speech for use in rate-making computations.[22] Second, LILCO does not challenge the Commission's power and responsibility to guard against false, misleading or deceptive advertising by public utilities. See generally, Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661 (1977). See also, *Friedman v. Rogers*, 440 U.S. 1 (1979). Third, plaintiff does not challenge the power of the Commission to regulate

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[21] The recognition that the First Amendment protects the right to receive information as well as the right to disseminate it dates from *Martin v. Struthers*, 319 U.S. 141 (1943), when this Court invalidated an ordinance outlawing house to house canvassing because it interfered with the right of a householder to receive information. See also, *Thomas v. Collins*, 323 U.S. 516 (1945). The first explicit recognition of a "right to know" was in *Lamont v. Postmaster General*, 381 U.S. 301 (1965) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren market place of ideas that had only sellers and no buyers." *Id.* at 308 (Mr. Justice Brennan concurring). Most recently, in *Friedman v. Rogers*, 440 U.S. 1 (1979), this Court upheld a Texas ban on trade names by optometrists since the use of trade names often caused consumer confusion.

[22] The effect of such a cost allocation formula is to place a ceiling on the amounts which a utility may expend on advertising and include in its rate-making base.

advertisements urging unlawful activity. E.g., *Pittsburgh Press v. Human Relations Commission,* 413 U.S. 376 (1973).[23] Fourth, LILCO recognizes that the government may have a greater power to regulate commercial solicitations on electronic media. Cf. *Capital Broadcasting Co. v. Mitchell,* 333 F. Supp. 582 (D.D.C. 1971) aff'd 405 U.S. 1000 (1972). Finally, LILCO does not challenge the power of the Commission to impose emergency restraints on commercial speech when serious doubt (as opposed to "undifferentiated apprehension") exists concerning the ability of the public utility to provide the advertised service.[24]

In the instant case, however, the Commission has proffered no justification for its ban on electric home heating advertisements which does not run squarely afoul of the First Amendment. The observation of Mr. Justice Blackmun, writing for the Court in *Bates* and invalidating Arizona's ban on lawyer advertising, seems particularly applicable to the Commission's attempt to ban electric heating advertisments:

> . . . it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative—the prohibi-

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[23] In *Bigelow v. Virginia, supra,* the illegality of a given act (abortion) in Virginia was not sufficient to ban the dissemination to Virginians of information about its lawful availability in New York. Presumably, however, information about its availability in Virginia could have been suppressed.

[24] Such regulation may well be merely a subspecies of the power to deal with false, misleading or deceptive advertising.

> tion of advertising—serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, *we view as dubious any justification that is based on the benefits of public ignorance.* (emphasis added) *Bates v. State Bar of Arizona,* 433 U.S. 350, at 374-75.

Since the Commission's ban on truthful dissemination of information on the merits of electric home heating is explicitly based on the "benefits" of public ignorance, the decision of the Federal District Court in *Long Island Lighting Company v. New York State Public Service Commission,* 77 Civ. 972, invalidating it should be affirmed.

Despite the substantial First Amendment protection enjoyed by LILCO's commercial speech, the Commission seeks to uphold its ban by arguing, first, that the ban on the promotion of electricity advances a significant state interest by dampening unnecessary and socially undesirable growth in the demand for electricity, and second, that the ban does not deprive consumers of commercially relevant information, since no competition exists in the sale of electricity. The District Court quite properly rejected the Commission's arguments, noting that information control is an impermissible method of advancing even significant governmental goals and that consumers, confronted with a choice between electric and oil heat, possess a clear interest in receiving information on the respective merits of each. *Long Island Lighting Company v. New York State Public Service Commission,* 77 Civ. 972 (E.D.N.Y.

1979). However, the New York Court of Appeals accepted both aspects of the Commission's argument. *Central Hudson Gas & Electric Corporation v. New York State Public Service Commission*, 47 N.Y.2d 94, 417 N.Y.S.2d 30 (1979), prob. jur. noted, ____ U.S. ____ (1979). Neither aspect of the Commission's position can withstand analysis.

First, LILCO does not quarrel with the Commission's twin goals of conservation and the avoidance of unnecessary growth in electrical demand. It is with the method chosen by the Commission to advance its goals—information control—that LILCO disagrees. Rather than impose direct controls on electric space heating, the Commission has attempted to dampen demand indirectly by denying consumers truthful and non-coercive information relevant to making an informed, lawful choice. Such a covert form of regulation is deeply troubling, since it provides consumers with the illusion of free choice while effectively conditioning them to act in a pre-determined manner. Moreover, regulation by information control allows regulators to carry out wide ranging schemes without subjecting them to open scrutiny. Thus, in the instant case, the Commission has admitted that it would be unable to make a case for direct restrictions on electric heat. However, by cutting off information on electric heat, the Commission is able to achieve its *de facto* prohibition without subjecting its decision to political or judicial scrutiny.

LILCO has no quarrel with the Commission's obligation to assure that utility advertising is both truthful and non-coercive. Indeed, this Court has quite properly held that coercive or misleading commercial speech is

not entitled to constitutional protection. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Friedman v. Rogers*, 440 U.S. 1 (1979). However, the Commission does not object to LILCO's speech as coercive or misleading. Rather, it is precisely because LILCO's speech is accurate; and because the Commission fears that accurate information may lead consumers to make what, to the Commission, appears a socially undesirable choice, that the advertisements have been banned.[25] Such an approach is paternalistic in the extreme and in clear violation of the First Amendment.[26]

Second, the Commission's argument that consumers receive no benefit from LILCO's advertisements is un-

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[25] In fairness, the Commission has denied banning LILCO's ads merely because it fears that consumers might act upon them. If, in fact, LILCO is incorrect in assuming that the Commission adheres to its ban because it fears that, otherwise, consumers will choose electric heat in greater numbers, then no rational basis whatever exists for the ban.

[26] Wholly apart from the Commission's power to ban truthful information about electric heat, LILCO does not believe that such a ban would result in conservation or a dampening in unnecessary demand. Given Long Island's climate, some form of space heating is imperative. Shifting consumers from electric to oil heat merely changes the form of the demand; it does not materially decrease it. Moreover, since LILCO is a summer peaking company, anticipated increases in off-peak winter demand attributable to electric space heating may be met by utilizing excess generating capacity.

However, even if the Commission were able to demonstrate that a limitation on electric space heating would save oil and dampen unnecessary demand, the Commission would, nevertheless, lack the power to achieve the limitation covertly by denying consumers access to information about electric heat. It is precisely the gravamen of this case that the Commission's regulatory powers must be exercised openly by direct regulation of disfavored conduct rather than covertly by the suppression of speech which might lead to the disfavored conduct.

tenable. The Commission, in an attempt to distinguish the recent decisions of this Court recognizing a First Amendment right to receive commercial information relevant to lawful consumer choices, argues that the monopoly status of LILCO as a seller of electricity eliminates the need for commercial information concerning its purchase. Since, the Commission argues, both supplier and price are fixed, consumers receive no real benefit from advertisements promoting electricity. However, whatever the facial validity of the Commission's ban, LILCO does not seek to invalidate the ban on its face, but only as applied to LILCO's electric heating advertisements. In the context of such a narrow "as applied" challenge, the Commission's attempt to salvage its regulation by citing LILCO's monopoly status collapses. LILCO, as a supplier of electric space heating is in direct competition with fuel oil dealers for a share of the Long Island space heating market.[27] In such a competitive context the consumer's need for information relevant to the making of an informed consumer choice between oil and electric heat is unaffected by LILCO's status as the sole supplier of electricity.[28]

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[27] No restriction exists on the promotion of oil heat. The unfairness of permitting fuel oil dealers complete freedom to promote oil heat, while forbidding the promotion of electric heat, is discussed *infra*, at Point II.

[28] Even if one were to accept the Commission's pure monopoly model, consumers must, nevertheless, decide whether to expend finite resources to purchase more electricity or to purchase unrelated goods and services in competition for the consumer's dollar. Thus, even at its strongest, the Commission's ban raises First Amendment issues, since even in a pure monopoly context, truthful, non-coercive information would be of assistance to a consumer in making an inevitable market choice.

The arguments raised by the Commission in defense of its regulation have as a common denominator the Commission's insistence that the constitutionality of its ban on promoting electricity be judged in the abstract. Thus, the Commission argues, because a state of facts might exist which would justify a ban on promoting certain categories of electrical usage, a blanket ban on promoting all electrical usage is constitutional.[29] LILCO, on the other hand, has urged that the constitutionality of a restriction on commercial speech must be judged "as applied". Thus, LILCO argues, even if a state of facts might exist which would justify a ban on promoting certain categories of electrical usage, the ban on promoting electric heat cannot survive constitutional scrutiny. The District Court followed an "as applied" analysis in striking down, not the entire ban, but merely its application to LILCO's advertisements. *Long Island Lighting Company v. New York State Public Service Commission,* 77 Civ. 972 (E.D.N.Y. 1979). The New York Court of Appeals, influenced no doubt by the summary nature of the procedure pur-

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[29] The ideal fact pattern hypothesized by the Commission involves the promotion of electrical usage in circumstances free from competition by other energy sources and where on-peak demand would be augmented. Under such a hypothetical fact pattern, the Commission argues, the consumer receives little information of commercial value, since he has no choice between competing energy sources and the public suffers a severe detriment, since the augmenting of on-peak demand requires the construction of additional generating facilities. Even under such ideal conditions, LILCO believes that the Commission may not suppress truthful speech to achieve a covert regulatory end. However, one need not decide the hypothetical constitutionality of the Commission's regulation to recognize that when applied to the facts of the LILCO case—involving competing energy sources and off-peak demand—it is unconstitutional.

suant to Article 78 CPLR, viewed the regulation facially and upheld its constitutionality. *Central Hudson Gas & Electric Corporation v. New York State Public Service Commission, supra.* Thus, a fundamental issue posed by this appeal is whether the Commission's regulation should be reviewed facially or "as applied."[30] Traditionally, economic regulations issued by administrative agencies have been upheld pursuant to facial rather than "as applied" review. Eg. *Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955). Thus, once an economic regulation is deemed rationally related to the advancement of a legitimate state interest, courts generally have declined to inquire whether the regulation "as applied" actually advances the state interest in question. The Commission's position mirrors the traditional economic regulatory approach.

In a First Amendment context, however, precisely the opposite approach to judicial review has arisen. Thus, under the First Amendment overbreadth doctrine, once a statute is perceived as potentially applicable to protected activity, this Court has invalidated it without inquiring whether the speech in question could have been subjected to narrower regulation. E.g. *Lewis v. New Orleans,* 415 U.S. 130 (1974).

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[30] The traditional posture of the litigants on this issue is reversed in this case. In recent years, persons challenging governmental action on First Amendment grounds have often urged this Court to review the facial validity of a regulation rather than its "as applied" constitutionality, in the hope of invoking the First Amendment overbreadth doctrine. Compare *Broadrick v. Oklahoma,* 413 U.S. 601 (1973) with *Gooding v. Wilson,* 405 U.S. 518 (1972). Such an approach deflects this Court's scrutiny from the actual facts of a given case to a hypothetical set of facts. In this case, the Commission seeks to deflect attention from the actual facts to a hypothetical set of facts in order to uphold the regulation's constitutionality.

It is, LILCO suggests, inappropriate to apply either mode of facial review to commercial speech. Instead, regulations affecting commercial speech should be subjected to "as applied" review to determine whether, on the facts of each case, the government's interest in prohibiting a given communication outweighs the consumer's interest in receiving the information in question. *Bates v. State Bar of Arizona,* 433 U.S. 350, 380 (1977); *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 462 n. 20 (1978). See generally, *Marsh v. Alabama,* 326 U.S. 501 (1946); *Cohen v. California,* 403 U.S. 15 (1971). When such an analysis is applied to the Commission's refusal to permit LILCO to discuss the merits of electric heat, the regulation is clearly unconstitutional "as applied".

First, the Long Island consumers affected by the Commission's regulation have an obvious and powerful interest in acquiring truthful information necessary to an informed choice on the relative merits of competing forms of space heating.[31]

Second, the mode of communication used by LILCO is neither potentially misleading nor potentially coercive. *Friedman v. Rogers,* 440 U.S. 1 (1979); *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978).

Third, the government has little or no legitimate interest in promoting conservation and dampening unnecessary demand by enforcing public ignorance. Eg.

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[31] Unlike the purely commercial information at issue in *Friedman v. Rogers,* 440 U.S. 1 (1979), LILCO's heating advertisements involve matters of general concern transcending "pure" commercial speech. *Friedman v. Rogers,* 440 U.S. 1, 10 n. 9 (1979).

Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977); *Carey v. Population Services, Inc.*, 431 U.S. 678 (1977). Thus, while the Commission has a strong interest in prohibiting false, misleading or coercive advertisements, the Commission has no legitimate interest in suppressing truthful information merely because it may persuade persons to engage in perfectly lawful activity.

When one balances the strong consumer interest in receiving the information in question against the impermissible governmental interest in its suppression,[32] the wisdom of the District Court's decision to invalidate the ban "as applied" is apparent.

II.

In prohibiting LILCO from discussing merits of electric heating while freely permitting LILCO's competitors to discuss the merits of oil heating, New York has effected an unconstitutional discrimination based upon the content of proposed speech.

The Commission has forbidden LILCO from discussing the relative merits of oil and electric space heating. On the other hand, no regulation inhibits oil dealers from engaging in the aggressive promotion of oil heat and the aggressive denigration of electric heat.[33] The

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[32] Given the lack of a permissible governmental interest in suppressing truthful, non-coercive speech, it is questionable whether a balancing test is appropriate at all.

[33] Representative examples of communications by oil dealers on the relative merits of oil and electric heating are annexed to the affidavit of Ira Freilicher as Exhibit V. [A 127a].

net result of New York's existing regulation is a grossly discriminatory scheme pursuant to which proponents of oil heat are granted a state created informational monopoly. Such a grossly discriminatory regulation of speech violates basic tenets of equality in the application of the First Amendment.

This Court has painstakingly evolved an equal access principle in the area of First Amendment which forbids the government from discriminating among speakers on the basis of content. E.g., *Police Department of Chicago v. Mosley,* 408 U.S. 92 (1972). In *Mosley,* the Court invalidated a prohibition on picketing next to a school on the ground that the ordinance permitted labor picketing, but banned picketing involving non-labor issues. Mr. Justice Marshall, writing for a unanimous Court, stated:

> "The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. . . . But above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.
>
> Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intended to say. Selective exclusions from a public forum may not be based on content alone. . . .
>
> Guided by these principles, we have frequently condemned such discrimination among different users of the same medium for expression. 408 U.S. at 95-96.

By permitting only one side of an issue to be publicly discussed, the Commission has engaged in an even more blatant violation of the equal access principle than the discriminatory ordinance at issue in *Mosley*.[34]

Thus, regardless of the intrinsically protected nature of LILCO's commercial communication, so long as New York permits public discussion of the relative merits of oil and electric heat, New York may not permit one side of the dispute to be aired freely, while imposing an absolute ban on the dissemination of a contrary view. See also, *Schacht v. United States,* 398 U.S. 58 (1970) (invalidating ban on use of military uniforms in skits because banned only when would discredit military).

Since the Commission's absolute ban on electric heating advertisements unconstitutionally impedes the dissemination of accurate information, and does so in a blatantly discriminatory manner, it should not be permitted to stand.

The Commission seeks to avoid the impact of *Mosley* by arguing that, since it lacks power to regulate advertisements by oil dealers, it cannot be guilty of discriminatory treatment. However, the issue is not whether the Commission has discriminatorily exercised

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[34] For earlier Supreme Court applications of the equal access principle to condemn content based discriminatory activity, see e.g., *Niemotko v. Maryland,* 340 U.S. 268 (1951); *Fowler v. Rhode Island,* 345 U.S. 67 (1953). See also, *Flower v. United States,* 407 U.S. 197 (1972). For state court application of the equal access principle, see, e.g., *Danskin v. San Diego Unified School District,* 28 Cal.2d 536, 171 P.2d 885 (1946); *East Meadow Community Concerts Ass'n v. Board of Education,* 19 N.Y. 2d 605, 224 N.E. 2d 888, 278 N.Y.S. 2d 393 (1967); *Indiana Civil Liberties Union v. Indiana War Memorials Commission,* 291 N.E. 2d 888 (Ind. 1973).

its power, but whether officials acting under color of New York law have acted to suppress one side of an issue. Surely, the *Mosley* non-discrimination principle cannot be evaded by the simple expedient of selectively parcelling regulatory authority among a series of state agencies. So long as New York has established a regulatory scheme which acts to suppress one side of an issue but permits the other side to speak, it is in clear violation of *Mosley*.

Conclusion

For the above stated reasons the judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

BURT NEUBORNE
40 Washington Square South
New York, New York 10012
(212) 598-2713

EDWARD M. BARRETT
General Counsel
Long Island Lighting Company
250 Old Country Road
Mineola, New York 11501

Attorneys for Amicus Curiae

Dated: New York, New York
January 9, 1980

Appendices

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket No. 77 C 972

LONG ISLAND LIGHTING COMPANY,

Plaintiff,

—against—

THE NEW YORK STATE PUBLIC SERVICE COMMISSION *et al.*,

Defendants.

MEMORANDUM AND ORDER

PRATT, J.:

I. INTRODUCTION

Plaintiff Long Island Lighting Company (LILCO) commenced this action to declare unconstitutional and to enjoin enforcement of orders issued by defendant New York State Public Service Commission (PSC) which prohibit (1) LILCO's promotional advertising of electrical space heating for residential use, and (2) LILCO's use of inserts in its billing envelopes to disseminate its views on the uses and benefits of nuclear energy. The action is brought pursuant to 42 USC § 1983 and its jurisdictional counterpart, 28 USC § 1343(3); the Declaratory Judgment Act, 28 USC § 2201 *et seq.*; and the first and fourteenth amendments. Jurisdiction of a federal question is also alleged under 28 USC § 1331(a), the rights at issue allegedly being valued in excess of $10,000.[1]

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[1] Since 42 USC § 1983 is a sufficient predicate for jurisdiction under 28 USC § 1343(3), the direct constitutional claims

By memorandum and order dated August 31, 1977, the court permitted certain organizations and individuals to intervene, pursuant to FRCP 24(b), as parties defendant, but solely with respect to the issues involving the bill inserts. LILCO now moves, pursuant to FRCP 65, for a preliminary injunction, or in the alternative, for summary judgment pursuant to FRCP 56. PSC cross-moves to dismiss the action, based on the Johnson Act, 28 USC § 1342.

For purposes of the summary judgment motion, LILCO has conceded the existence of certain material facts alleged by the defendants to be in dispute, although the latter assert that even with such concessions, some material issues of fact remain. Nonetheless, as more fully explained below, the court determines that there are no disputed facts which are material to the dispositive issues.

II. Background and Nature of the Action

A. *The Parties.*

LILCO, a New York corporation, is a public utility engaged in the business of generating and supplying electrical and gas energy to approximately 900,000 residential and commercial customers in the counties of Nassau, Suffolk, and parts of Queens.

PSC is the public authority charged, pursuant to Article IV of the New York Public Service Law, with general powers of supervision and regulation over the activities of gas and electric utilities. See NY Pub. Serv. Law §§ 65, 66.

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asserted under 42 [sic] USC § 1331(a) and the first and fourteenth amendments are disregarded. See *Monell v. Dept. of Social Services*, ___ US ___, 98 SCt 2018 (1978); *Turpin v. Mailet*, 579 F2d 152 (CA2 1978), *judgment vacated*, 47 USLW 3368 (US Nov. 27, 1978), *modified on remand*, 47 USLW 2474 (CA2 Jan. 16, 1979) (en banc).

Intervenors are several individuals and non-profit organizations involved in the dissemination of information on nuclear power issues. Members of the organizations and the individual intervenors are customers of New York utilities, including LILCO, and have been recipients of bill inserts expressing views with which they disagree.

B. *PSC's Policy and Orders.*

In 1973 PSC gave notice of a proposal to issue an order restricting certain uses of electric energy. Prompted by a critical shortage in fuel oil available to generate electricity in the state, PSC proposed a variety of energy saving steps, invited written comments on its proposals, and required each utility to publish the proposals immediately. In addition, PSC ordered that "all electric corporations are hereby prohibited from promoting the use of electricity through the use of advertising * * *". LILCO did not then challenge that prohibition on advertising; instead, it complied with the order by ceasing to advertise electric space heating, a method of residential heating it had actively promoted for a number of years.

In 1976 PSC undertook a reexamination of the subjects of advertising by utilities and the promotion of electricity sales, and after receiving comments on the proposed position, it adopted on February 25, 1977 a "Statement of Policy on Advertising and Promotional Practices of Utility Companies" (Policy Statement). As part of that statement PSC concluded "that the existing ban on promotion of electricity sales should be continued."

Simultaneously with the policy statement, the commission issued an "order implementing certain restrictions on utility advertising" in which it ordered that

> All utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy.
>
> PSC order issued 2/25/77; Ex. III to complaint.

Several public utilities petitioned for rehearing, and on July 14, 1977, PSC issued its order denying those petitions.

On first amendment grounds, LILCO challenges both PSC's continued absolute prohibition against a utility's advertising to promote the use of electrical energy, and its order forbidding the use of bill inserts to present views of LILCO's management on "controversial issues of public policy." LILCO was and is directly affected by both bans, because it wishes to resume its promotion of electric space heating for residences, and it wishes to resume use of bill inserts as a means of promoting management's views on nuclear power, an issue of public policy that concededly is controversial, particularly on Long Island where LILCO is now engaged in planning and constructing two nuclear powered generating stations.

C. *State Court Proceedings.*

After this action was begun, other New York public utilities commenced two Article 78 proceedings in the New York State Supreme Court, Albany County, challenging the same two aspects of the 1977 policy statement and order that are at issue here. In separate decisions dated February 17, 1978, Judge Miner upheld PSC's ban on promotional advertising, but invalidated the ban on bill inserts, finding it to be an unconstitutional restriction on commercial speech. In a brief decision dated July 21, 1978, the Appellate Division, Third Department affirmed on the bill insert issue, but reversed on the promotional advertising issue, thus finding both bans to be constitutional and within PSC's statutory authority. Appeals in both cases are now pending before the New York State Court of Appeals.

D. *PSC's Motion to Dismiss.*

PSC's motion to dismiss the action on the basis of the Johnson Act, 28 USC § 1342, is denied. That statute de-

prives the district court of jurisdiction, under certain circumstances, to "enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency * * *." 28 USC § 1342.

PSC argues that rate issues are involved in both parts of this case in that (1) promotional advertising of electrical energy will eventually cause an increase in rates to consumers, and (2) using bill inserts to promote nuclear energy requires ratepayers to subsidize part of the mailing cost. Thus, according to PSC, both of the challenged orders are based on its rate-making responsibilities.

The Johnson Act "proscribes federal court injunctions of orders affecting public utility *rates*", *United States v. Public Service Com'n.*, 422 F Supp 676, 678 (D Md. 1976) (emphasis in original). While it has been considered that the act's prohibition "is not avoided by basing the action on the civil rights provisions of 28 USC § 1343(3) and 42 USC § 1983", *Klotz v. Consolidated Edison Co. of New York, Inc.*, 386 F Supp 577, 584 (SDNY 1974), it has also been held that "[t]he Johnson Act does not apply to [a] civil rights complaint" that attacks a public electric utility's credit policy, without challenging its electric rates. *Cody v. Union Electric Company*, 545 F2d 610, 611 (CA8 1976). As in *Cody*, the action here does not challenge any rates set by PSC; rather, the complaint alleges that PSC's orders violate LILCO's civil rights under 42 USC § 1983 and the first amendment. Such allegations, if proved, "justify federal remedial action". *Id.* at 612.

The relationship between PSC's orders and public utility rates in New York is indirect, remote, even debatable. Essentially, PSC argues that the effect of these activities, if not proscribed, would be to increase the cost of electricity and thereby force a change in public utility rates. But virtually all that PSC does has similar potential effects on the cost of services, and the Johnson Act was not intended to immunize all public utility activity from federal court injunctions; instead, it prohibits review only of "any

order affecting rates." To fall within the Johnson Act's prohibition, therefore, a challenged order must more directly affect rates than do the ones here under attack. Accordingly, PSC's motion to dismiss is denied.

III. Commercial Speech

Before addressing the two main issues of the case, the court must first consider the role of commercial speech under the first amendment. Until recently the first amendment's protection of commercial speech was severely limited. See, *e.g.*, *Valentine v. Chrestensen*, 316 US 52 (1942). In a series of cases decided since 1974, however, commercial speech has received extensive consideration and analysis, and its protection under the first amendment has been greatly expanded.

In *Bigelow v. Virginia*, 421 US 809 (1975), the Supreme Court stated: "[commercial] speech is not stripped of First Amendment protection merely because it appears in that form." *Id.* at 818. In that case, the Court balanced the first amendment interest against the government interest allegedly served by a regulation making it illegal to sell or circulate any publication encouraging or promoting the processing of an abortion. Holding the statute to be an unconstitutional infringement of the first amendment, the Court noted:

> We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit. Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. * * * To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the government interest alleged. Advertising

> is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.
>
> *Id.* at 825-26 (citations and footnotes omitted).

That commercial speech is entitled to first amendment protection was confirmed in *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council*, 425 US 748 (1976), where the Court held unconstitutional a state ban on advertising the prices of prescription drugs, concluding that a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Id.* at 773.

First amendment protection for commercial speech has been reiterated and reaffirmed in still more recent cases. In *Linmark Associates, Inc. v. Township of Willingboro*, 431 US 85 (1977), the Court struck down a local ban on the posting of "For Sale" signs on residential property, holding that the ordinance in question impaired the flow of truthful and legitimate commercial information to residents. In *Carey v. Population Services International*, 431 US 678 (1977), the Court struck down a ban on advertising contraceptives because the information was a matter of substantial individual and societal interest. In *Bates v. State Bar of Arizona*, 433 US 350 (1977), the court struck down an absolute ban on lawyer advertising, holding that such commercial speech "serves individual and societal interests in assuring informed and reliable decision making", *id.* at 364, and is, therefore, entitled to constitutional protection.

Most recently in *First National Bank of Boston v. Bellotti*, ___ US ___, 98 SCt 1407 (1978), the Supreme Court addressed a matter of collateral concern here, the first amendment rights of a corporation, and flatly rejected the proposition that speech by business entities is

not protected by the first amendment. Invalidating a statute that prohibited a corporation from spending corporate funds in order to disseminate views on state referenda whose issues were not materially related to the company's business, the Court noted that:

> [i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It [discussion of governmental affairs] is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.
>
> *Id.*, 98 SCt at 1416.

Thus, simply because LILCO is a public utility corporation does not deprive it of all first amendment rights.

To determine the constitutionality of the challenged bans on LILCO's communications, the court must balance the first amendment interests asserted by LILCO against the government interests claimed to be served by PSC's orders. See *Bigelow v. Virginia, supra,* 421 US at 826; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra; Linmark Associates, Inc. v. Township of Willingboro, supra.* The balancing analysis must be applied separately to PSC's prohibitions against promotional advertising and controversial bill inserts.

IV. PSC's Ban on Promotional Advertising of Electrical Energy

A. *Factual Background.*

There are three principal methods of home heating available to consumers on Long Island: oil fired space heating, natural gas fired space heating, and electric space heating. Limitations on the supply of natural gas effectively limit the choice to oil and electricity.

LILCO experiences broad seasonal fluctuations in the demand for electrical power; demand increases during the

summer months, attributable to air conditioner use, and decreases during the winter months. As a result, part of the generating capacity that LILCO requires to satisfy summer demand is not utilized during winter months when demand is lower.

To offset some of the fixed costs associated with owning and operating generating facilities all year, and thereby to use its generating facilities more efficiently, LILCO has in the past sought to stimulate electrical consumption during the winter months by advertising the advantages of electric space heating for residential use. Since almost all of LILCO's electrical generating capacity consists of oil fired generating stations, an increase in demand for electrical energy would increase the amount of oil required to generate it.

When the 1973 embargo on oil shipments from the Middle East to the United States caused a domestic oil shortage, PSC sought to limit the demand for electricity by forbidding all promotional advertising by utilities. LILCO complied with PSC's 1973 order and ceased its promotional advertising of electric space heating. Despite contentions that there was no longer a shortage of oil and that oil supplies were sufficient to serve current as well as additional customers of electrical energy, PSC in its 1977 Policy Statement and accompanying order continued its ban on promotional electricity advertising.

In continuing the ban, PSC noted that its highest priority was conservation of energy resources. It reasoned that increased off-peak generation of electricity consumes valuable energy resources and, if it is the result of increased sales, necessarily creates incremental air pollution and thermal discharges to waterways. Moreover, since most of the major utility companies use oil fired generating facilities, any increase in off-peak generation would aggravate the nation's already unacceptably high level of dependence on foreign sources of oil supply. PSC believed "that a continued proscription of promotion of electric sales will result in some dampening of unnecessary

To begin with, LILCO has an obvious economic interest in promoting the use of electrical energy and in advertising the availability of its services for electric space heating. That its interest is economic does not deprive it of first amendment protection. See *Bates v. State Bar, supra*, 433 US at 363-64; *Virginia State Board v. Virginia Citizens, supra*, 425 US at 762-63.

Beyond LILCO's economic interest is the public's interest in the free flow of information on the use of electrical energy for home heating. The consumer has a substantial interest in receiving truthful information on electric space heating. Not only does promotional advertising provide information of general public interest concerning electrical energy, it also assists an individual's economic decisions on the benefits and detriments of electric heat. Choosing among oil, gas, or electric residential heating may significantly affect his budget and daily comfort. Moreover, the public in general has an interest in receiving information on the various methods of heating, in order to utilize energy resources ecologically and efficiently. As explained by Justice Blackmun, writing for the court in *Bates v. State Bar, supra*,

> [t]he listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decision making.
>
> *Bates v. State Bar, supra*, 433 US at 364 (citations omitted).

With respect to promotional advertising, then, "where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Virginia State Board v. Virginia Citizens, supra*, 425 US at 756.

The next question is whether the interests allegedly furthered by the PSC ban outweigh these first amendment interests.

As reflected in its 1977 Policy Statement, PSC's major reason for continuing its ban on promotional advertising was to curb the increased use of electricity in New York. Additional reasons offered have been the maintenance of an economically stable and efficient electric rate structure and preservation of the environment. PSC's position is clear from its counsel's argument:

> A reversal of the Commission's prohibition on advertising would prohibit the Commission from taking an effective means to curb the growth of electric usage in New York State, a growth that has over the past several years increased costs and rates, consumed expensive foreign oil and increased the environmental impact of public utility operations.
>
> Defendants' Memorandum of Law in Opposition to Motion for Summary Judgment, at 27.

Of course, these are legitimate interests which the state properly may seek to further; but it is the method used, a direct infringement of first amendment interests, that is under scrutiny.

PSC has not sought to limit the use of electricity directly; rather, by suppressing accurate promotional information it is attempting to avoid certain perceived detrimental effects of electric space heating. Although PSC's objectives might properly be achieved through direct regulation of electric space heating or, indeed, of all electrical consumption, PSC is attempting an indirect regulation through the advertising ban, which, by deliberately

inhibiting public awareness of the merits of electric heat, attempts to avoid increased consumption of electricity. This, PSC cannot do, because it is a significant interference with the first amendment. As the Supreme Court has observed,

> * * * it seems peculiar to deny the consumer * * * at least some of the relevant information needed to reach an informed decision. The alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, *we view as dubious any justification that is based on the benefits of public ignorance.*
>
> *Bates v. State Bar, supra,* 433 US at 374-75 (emphasis supplied).

In *Virginia State Board, supra,* a state licensing authority sought to justify a total ban on advertising the prices of prescription drugs sold by pharmacists. The Supreme Court observed:

> The strength of these proffered justifications is greatly undermined by the fact that high professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject.
>
> * * *
>
> * * * [T]he State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is

assumed people will have to the free flow of drug price information.

* * *

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

* * *

It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them * * * in other ways. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering.

Virginia State Board v. Virginia Citizens, supra, 425 US at 768-70 (emphasis supplied) (citations omitted).

PSC has statutory power to regulate the use of electrical energy directly by fixing rates, by approving construction of new generating facilities or expansion of existing ones, or by allocating quantities of energy production. See NY Pub. Serv. Law § 66. But it may not do so "by keeping the public in ignorance" of the entirely lawful use of electric space heating. See *Virginia State Board, supra,* 425 US at 770.

PSC argues that the ban does not suppress information concerning electric heat because LILCO is not prohibited from discussing the topic with anyone who seeks information about it. However, permitting communication to a

customer *if* he inquires, does not save the ban. The fact that the seller could provide information to a prospective purchaser who inquired did not save the bans on advertising lawyer services in *Bates v. State Bar, supra;* on posting "For Sale" signs on homeowners' lawns in *Linmark Associates v. Township of Willingboro, supra;* on advertising prices of prescription drugs in *Virginia State Board, supra;* or on advertising contraceptives in *Carey v. Population Services, supra.* Nor does it save PSC's ban on promotional advertising of electric heat.

PSC also argues that its ban does not unconstitutionally suppress information about electric heat because it does not affect advertising by appliance dealers who sell electric space heating devices. This argument is not persuasive. For one thing, PSC has no jurisdiction over such appliance dealers. In addition, "serious questions exist as to whether the [order] 'leaves open ample alternative channels of communication'". *Linmark Associates, Inc. v. Township of Willingboro, supra,* 431 US at 93. PSC has presented nothing to show that appliance dealers have been advertising electric heat through newspapers, radio or any other media designed to reach a large audience. Its ban thus has the effect of suppressing virtually all truthful information concerning electric heat.

As the Court most recently observed:

> * * * the First Amendment * * * prohibit[s] government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of commercial information".
>
> *First National Bank v. Bellotti, supra,* 98 SCt at 1419-20.

Like the statutes and regulations challenged in other cases, PSC's ban on promotional advertising of electricity inhibits the "free flow of commercial information." Although the public interests sought to be served by PSC are important, it is not necessary to suppress protected speech in order to achieve those ends. Since the allegedly harmful consequences of increased usage of electric heat may be regulated by means that are not only more directly related to the results sought, but also less restrictive of LILCO's first amendment rights, PSC's ban on promotional advertising of electricity by public utilities is unconstitutional.

V. PSC's Ban on Controversial Bill Inserts

A. Factual Background.

In order to publicize its belief that "nuclear generated power is the most economical, efficient and socially desirable method of meeting Long Island's need for increased energy", Plaintiff's memorandum at 22, LILCO has at times communicated its views about nuclear power to its customers through the use of bill inserts. LILCO believes that such inserts provide a significant medium for efficiently communicating with its customers at reasonable cost.

There is no claim that LILCO's bill inserts have been false or defamatory, nor is there any dispute that such communications on nuclear power are political in nature, that they must be paid for solely by LILCO shareholders, and that their out-of-pocket costs may not be considered an expense of doing business for rate making purposes.

PSC's ban on the use of such bill inserts had its origin in a complaint filed with PSC by the Natural Resources Defense Council, Inc. one of the intervenors in this case, which sought redress for a similar 1976 Con Edison bill insert that discussed the need for nuclear power development. After investigation and hearing, PSC determined

that bill inserts should not be used to express the opinion of management on "controversial issues of public policy".

In the lengthy policy statement issued on February 25, 1977, PSC explained its reasoning. After summarizing its long-standing position that ratepayers should not bear the expense of advertising which states a utility's position on a matter of public controversy, PSC concluded that such advertising would not be permitted to be included as a bill insert, even when the stockholder pays for it in full. PSC summarized its position as follows:

> Further, we shall not permit advertising on matters of public controversy to be included in the printed material that often accompanies the mailing of consumer bills. We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues (even when the stockholder pays for it in full) is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism. A utility company's mailing list provides an available conduit for the easy dissemination of information, which should be used for the benefit of both the consumer and the company to convey noncontroversial and useful information that will create a better informed public. It should not become a vehicle for dissemination only of the company's views on controversial matters of public policy. Accordingly, we will not permit bill inserts to be used by utility companies for the purpose of advertising their opinions or viewpoints on controversial issues of public policy.
>
> 1977 Policy Statement at 10-11

When PSC issued its order denying the petitions of various utilities for rehearing, it considered in greater

detail the bill insert restriction in light of the utilities' first amendment contentions. It pointed out that it had not prohibited the companies from making their views known, that use of the bill insert to publicize a utility's views on matters of public controversy was in PSC's judgment improper "since it gives a utility a unique and undue advantage in publicizing its position" to a "selectively chosen target audience", that "the unique advantage * * * is then transformed into a device for presenting only one side of this issue", and that this confers "an unreasonable advantage on management that unduly discriminates against others who may not share or who oppose the company's views". PSC Order Denying Rehearing, at 6 (July 14, 1977). PSC also focused on the limitations inherent in this "unique medium of communications". Its size and weight should not be so great as to require additional postage, and it can be mailed only once a month, and in many cases, only once every other month.

In PSC's view, bill inserts should be used "*primarily* to convey information that is clearly helpful to consumers" (emphasis supplied), and the prohibition is aimed at preserving that "public interest objective". Moreover, according to PSC, no one else can obtain the "wide captive audience for bill inserts" that is enjoyed by utilities having monopoly franchises conferred by the government. In its view, this aspect makes the utility bill insert medium analogous to the limited spectrum space available for radio and television broadcasting, a consideration that leads to problems of "fairness" and equal time so as to permit organizations with opposing viewpoints an opportunity to disseminate their opinions as inserts in the utility's bill. *Id.* at 7-8. After considering that approach, all PSC members were convinced ultimately "that it would be difficult to administer fairly, and would tend to lessen undesirably the number of bill inserts dealing directly with such useful and uncontroversial information as consumer conservation measures." *Id.* at 8. PSC also noted that the privilege to disseminate utility bill inserts derives

from the privilege of franchise monopoly conferred by the government, and that it can, therefore, be regulated by the government to assure that it is exercised in the public interest.

Solely for the purpose of the summary judgment motion, LILCO has assumed certain facts to be established: (1) that LILCO derives an intangible benefit from the distribution of bill inserts discussing its views on controversial issues, although it contends that no consumer incurs any out-of-pocket expenses attributable to the bill insert program, and, (2) that alternative means of communication, such as newspaper advertising, are available at comparable cost, but that in management's opinion, such alternative means are not as effective a form of expression.[2]

PSC and intervenors argue that there is a factual dispute as to whether LILCO's customers (the ratepayers) are forced to subsidize political views with which they

[2] PSC disputes LILCO's contention that bill inserts are an effective means of communication compared to other methods, but LILCO has acceded to PSC's view for purposes of this motion, so there is no dispute as to this fact. It should be noted, however, that LILCO's position on the relative cost efficiency of bill inserts, compared with other forms of communication to the public, is supported by a PSC ruling that required utilities to use bill inserts to notify customers of prospective rate changes:

> While other methods of notification of rate filings are required by statute and the Commission's rules, the narrative description under discussion should be easier to read and understand and would be provided to all customers directly. *We believe that the bill insert requirement we have proposed should effect a significant improvement in notice to the public at minor cost.*
>
> Petition of Consumer Protection Board, NYS Public Service Commission, Case 26972, at 5-6 (Aug. 10, 1976) (emph. supp.).

Prior to this ruling, utilities were required to use newspaper advertisements to notify customers of proposed rate changes and hearings on such changes. Thus, despite its argument to the contrary in this case, PSC itself has recognized bill inserts as an efficient means of communication.

disagree, or in other words, whether all the costs of bill inserts containing political advertising can realistically be allocated between LILCO's ratepayers and shareholders. PSC claims that cost allocation is difficult for three reasons: first, since bill envelopes are limited in size LILCO would have less space to provide for information related to utility services or energy conservation tips if it provided more space for political messages; second, since the determination of rates is based on past expenses and anticipated increases, LILCO might prevent a loss of earnings stemming from cost allocation of political advertising, by simply spending less on customer service; finally, since rates are also set to insure profits for capital formation, a loss in LILCO's earnings due to cost allocation of political advertising expenses (including such advertising in bill inserts) could be made up by increasing electric rates in order to bring in sufficient income to raise the necessary capital. These arguments about cost allocation, however, are irrelevant to PSC's ban on controversial bill inserts, which was to apply "even when the stockholder pays for it in full." 1977 Policy Statement at 10.

Moreover, PSC has presented no facts to support its contention that, contrary to LILCO's position, costs cannot be allocated between ratepayers and shareholders. See *SEC v. Research Automation Corporation et al.*, 585 F2d 31, 33 (CA2 1978). Indeed, it seems inequitable for PSC to allege a factual dispute that is the result of its own admitted failure to formulate a cost allocation scheme for bill inserts. Nor have intervenors alleged facts to indicate that a fair cost allocation is impossible. On the other hand, LILCO's contention that cost allocation is feasible, is supported by facts. During a three month period in 1977, LILCO employees kept time sheets to determine the extent to which they were engaged in the bill insert process, LILCO's 9(g) Statement, Part B, ¶ 25; a list of hours and allocated salaries, as well as the cost of single sheet and more elaborate bill inserts discussing nuclear power, is also provided. LILCO 9(g) Statement, Part B, ¶ ¶ 25-26.

From these it appears feasible for PSC to allocate the costs of a bill insert so that they may be attributed solely to LILCO's shareholders, and not to its ratepayers.

On the issue of whether bill insert costs can be apportioned, different methods of allocation are possible. One approach would be to charge the shareholders any additional costs of the inserts over and above the costs of mailing the bills to the ratepayers. Another would be just the reverse, that is to charge to the shareholders the full cost of mailing the inserts and envelopes and only incremental costs to the ratepayers for including the bills. A third would be to prorate the costs of the single mailing between the bill and the insert on a basis of space, number of words, or other reasonable manner. In any event, the problem is administrative, not constitutional.

Whatever allocation method might be used, however, to the extent that the cost of an insert is less than the cost of a separate mailing of the same insert, it would represent a benefit or "free ride" to shareholders which had been paid for by ratepayers. Moreover, LILCO concedes that with any method of allocation there would be an intangible benefit from using bill inserts arising out of its access to a prepared mailing list and access to an existing bill stuffing and mailing system.

B. Discussion

1. LILCO and its advocacy of nuclear power are both entitled to some first amendment protection.

In *First National Bank v. Bellotti, supra,* the Supreme Court ruled that corporate speech is entitled to first amendment protection, even when such speech deals with matters unrelated to the corporation's business interests. The thrust of the decision was that in the free discussion of governmental affairs, the nature of the speaker is not constitutionally significant and does not call into question different first amendment considerations. The Court noted

that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual." *Id.*, 98 SCt at 1416.

LILCO argues that the purpose of its communications on nuclear power is to inform customers of the advantages of that form of energy and to reassure customers on management's judgment in pursuing the development of nuclear power. The bill inserts prohibited by PSC seek to discuss the merits of nuclear energy, a matter of current debate and divergent opinion. LILCO's proposed construction of nuclear power plants on Long Island is an issue seriously affecting both individual and community interests; since opponents of nuclear energy have campaigned against the building of such facilities, the controversy has received substantial media attention. Even though LILCO may stand to gain commercially from completion of the nuclear plants, the information it seeks to disseminate is essentially political, and "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 US 64, 78 (1964).

It is clear, then, that debate on nuclear power is the type of speech the first amendment was designed to protect, see *Bellotti, supra,* 98 SCt at 1415, and that LILCO's interest in expressing itself on that issue is entitled to first amendment protection. It remains to be determined whether PSC's prohibition of bill inserts as a vehicle for LILCO's expression on a controversial issue such as nuclear power is an unconstitutional infringement of LILCO's first amendment rights of expression.

2. PSC's ban is not unconstitutionally vague.

LILCO argues that the ban on controversial issues of public policy in bill inserts is unconstitutional because it is vague. The court does not agree. LILCO contends that the alleged vagueness of the PSC ban raises three prob-

lems of constitutional dimension: (1) the ban fails to give adequate notice of the scope of its proscription; (2) the ban has a chilling effect on the exercise of first amendment rights; and (3) the ban vests overbroad discretion in PSC to regulate the content of proposed communications.[3] Under PSC guidelines, a public utility's expenditures for political advertising are recorded in a special "below-the-line" account, number 426.4, which excludes them from consideration as business expenses in the rate making process, thus placing their burden on shareholders rather than ratepayers.[4]

PSC interprets this special cost-allocation account to include

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[3] Extending these contentions, LILCO urges that since the PSC ban "applies only to inserts which discuss 'controversial matters of public policy' and explicitly authorizes 'non-controversial' and 'useful' inserts, [LILCO] is unable to determine whether many inserts fall into the proscribed or encouraged category." Aff. of Ira L. Freilicher, ¶ 13. As an example, LILCO refers to a bill insert discussing the federal food stamp program which had been disseminated prior to the PSC ban. LILCO argues that the food stamp program has been the subject of some controversy, and that under the present PSC ban, it would be impossible to determine whether a food stamp insert would now be deemed "controversial" or "useful". See Freilicher aff., ¶¶ 14-15. As a result, LILCO claims that it would be reluctant to disseminate bill inserts on that topic in the future.

[4] The account description provides:

> This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification or revocation of franchises; or for the purpose of influencing the decisions of public officials or advancing the political objective of the utility, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.
>
> Account 426.4, Expenditures for Certain Civic, Political and Related Activities. 16 NYCRR, Ch. III, Sub. Ch. F.

> All advertising which seeks to sway opinion—legislative, environmental, governmental, consumer or any other kind—to the industry's position on public policy disputes.
>
> 1977 Policy Statement at 10.

PSC has also stated that it would "include in this category expenses incurred in the preparation of materials designed to influence public opinion in the current debate concerning the development of nuclear power." *Id.* The account has existed for some time; it has been the subject of various state court and regulatory decisions interpreting what is meant by "political advertising"; and LILCO has indicated that it will continue to cooperate with the PSC cost-allocation guidelines for Account 426.4. Therefore, since the "controversial issues of public policy" now barred by PSC from bill inserts are those matters whose expenses would ordinarily be recorded in Account 426.4 as political advertising, PSC argues that some guidance does exist for utilities to follow in determining whether or not a particular bill insert falls into the proscribed category.

In its decision denying reconsideration of the policy statement, PSC considered the vagueness argument directly:

> The petitioners * * * argue that the term "controversial issues of public policy" is too vague and does not give them any clear standards by which to judge the content of their bill inserts.
>
> In the [cost-allocation] Guidelines, we discussed the various types of materials that would fall within our proscription. These Guidelines are admittedly general but we expect to give them greater definition through future advisory determination. One such determination was made in our Policy Statement where we specifically included in this category expenses incurred in the preparation of materials

> designed to influence opinion in the current debate concerning the development of nuclear power. In its petition here, Con Edison requested a determination as to whether materials prepared in response to the demand by several elected officials for public operation of its facilities falls within the political category. We believe that it does and, therefore, should not be included as a bill insert. In the event a utility wishes additional guidance with respect to this matter, it should feel free to ask it. We will resolve any request expeditiously so that no undue delay will result.
>
> Order Denying Petitions for Rehearing, *supra* at 8-9.

The Supreme Court has stated that:

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.
>
> *Connolly v. General Construction Company*, 269 US 385, 391 (1926).

In the context of the first amendment, the court has further stated:

> We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms * * *"; "[f]or standards of permissible statutory vagueness are strict in the area of free expression. * * * Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." * * * When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone * * *." * * * For "[t]he threat of sanctions may

> deter * * * almost as potently as the actual application of sanctions."
>
> *Keyishian v. Board of Regents*, 385 US 589, 603-04 (1967) (citations omitted).

The Supreme Court thus requires "more specificity of a statute potentially applicable to expression sheltered by the first amendment than in other contexts * * *." Laurence H. Tribe, *American Constitutional Law* 719 (1978). In *Smith v. Goguen*, 415 US 566 (1974), where the Court invalidated as being unconstitutionally vague, a state provision punishing "contemptuous" treatment of the American flag, the Court noted that "[w]here a statute's literal scope * * * is capable of reaching expression sheltered by the First Amendment, the [due process/vagueness] doctrine demands a greater degree of specificity than in other contexts." *Id.* at 573. See also *Grayned v. City of Rockford*, 408 US 104, 108-09 (1972); *Papachristou v. City of Jacksonville*, 405 US 156, 162 (1972); *Lanzetta v. New Jersey*, 306 US 451, 453 (1939).

Even under these high standards it does not appear that the PSC's exclusion of "controversial issues of public policy" from bill inserts is unconstitutionally vague. In context the phrase is a synonym for the "political advertising" for which expenditures are recorded in Account 426.4. Interpretation of what is "controversial" or "noncontroversial" may be governed by those considerations which determine expenditures recorded in that account. PSC has already had some expertise, and the public utilities some guidance, on what matters are considered "political" and thus subject to recording in Account 426.4; these interpretations may similarly be used as guidelines in determining what is or is not "controversial".

LILCO also cites *First National Bank v. Bellotti, supra*, to support its vagueness argument. There the Supreme Court found unconstitutional a Massachusetts statute barring corporations from making expenditures designed to influence referenda on questions other than those

"materially affecting" the property, business, or assets of the corporation. Justice Powell discussed the vague and deterrent affect of the statute's "materially affecting" standard:

> Even assuming that the rationale behind the materially affecting requirement itself where unobjectionable, the limitation in [the statute] would have an impermissibly restraining effect on protected speech. Much valuable information which a corporation might be able to provide would remain unpublished because corporate management would not be willing to risk the substantial criminal penalties—personal as well as corporate—provided for in [the statute]. * * * As the facts in this case illustrate, management could never be sure whether a court would disagree with its judgment as to the effect upon the corporation's business of a particular referendum issue.
>
> *Id.*, 98 SCt at 1420, n.21 (citations omitted).

LILCO argues that the "controversial issues of public policy" standard used in the PSC ban is even more subjective and amorphous than *Bellotti's* "materially affecting" standard. *Bellotti*, however, is readily distinguishable. The rejected standard of the Massachusetts statute had no prior history of interpretation or guidance from court or administrative opinions, whereas the language adopted by the PSC closely parallels the standard of political advertising attributable to Account 426.4, which does have a history of prior interpretation.

Moreover, as an administrative regulation the PSC restriction lacks the chilling impact of the potential jail sentence imposed by the Massachussets statute. It even bears the promise of the PSC to "expeditiously" resolve in advance any doubt about a particular proposed bill insert. Although the delay caused by even an expeditious administrative review might under some circumstances chill speech sufficiently to render the regulation unconstitu-

tional, that is not the case here, where the affected speech lacks spontaneity and is prepared for inclusion in the monthly billing envelope.

Thus, the ban is not unconstitutional on grounds of vagueness.

3. PSC's ban does not otherwise infringe LILCO's first amendment rights.

In its order denying rehearing, PSC stated:

> We have not, of course, prohibited the utilities from expressing their corporate opinions on controversial public policy issues in any other media. They are free, like all other members of our society, to explain their positions on radio and television interviews, to seek to purchase space in newspapers, and to speak before public gatherings. For these kinds of communications, we merely require that the companies, rather than their customers, bear the costs.
>
> Order Denying Petitions for Rehearing, *supra* at 10.

Thus, PSC's order is not an absolute ban but rather, a restriction on one method of communication, a distinction that the Supreme Court has stated "is not without significance to First Amendment analysis since laws regulating the time, place or manner of speech stand on a different footing than laws prohibiting speech altogether." *Linmark v. Township of Willingborough*, *supra*, 431 US at 93.

The Supreme Court has

> * * * often approved [time, place, or manner restrictions] provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information.
>
> *Virginia State Board v. Virginia Citizens*, *supra*, 425 US at 771.

See also *Grayned v. City of Rockford, supra*, 408 US at 115-17; *Buckley v. Valeo*, 424 US 1, 17-18 (1976).

However, PSC's prohibition against using bill inserts to express management's views on "controversial issues of public policy" does not fit nicely into the category of a time, place, or manner restriction. As *Virginia State Board, supra*, teaches, three tests must be met before speech may be restricted under that analysis. Two are clearly met here; but the analysis breaks down on the third.

One test that is clearly met here is the requirement of ample alternative channels for communication. As already indicated, PSC has not prohibited utilities from urging nuclear power or other positions of a controversial nature; it has merely deprived them of the bill insert means for expounding their views. All other means of communicating with the public—newspaper advertisements, public speakers, or even house-to-house canvassing—are unaffected by the bill insert ban. Although LILCO may feel that no other approach is as effective or efficient as would be the use of bill inserts, the fact remains, nevertheless, that for communicating its views LILCO has available to it ample alternative channels, indeed all those channels that are available to virtually anyone else in our society who wishes to impress the public with a point of view. LILCO, in other words, is surely no worse off than other would-be communicators.

The second test which has been met here is that the restriction serve a significant governmental interest. PSC best summarized its justifications at pages 6 to 8 of its July 14, 1977 Order Denying Petitions for Rehearing. There, PSC expressed its belief that permitting utilities to use bill inserts to discuss controversial issues would confer an undue advantage on management, and would interfere with the primary function of bill inserts, namely to convey information that is clearly helpful to consumers. The types of information that PSC viewed to be properly distributed at ratepayers' expense, and therefore

presumably appropriately includable in bill inserts, were elsewhere described by PSC as including

> appeals for the conservation of gas or electricity; notification of emergency conditions and procedures; instructions in the proper use of the equipment which makes use of the utility's service; information about new rates, new billing practices, or new inspection or meter reading schedules; advice concerning hazards associated with the utility's service; reports on matters of interest to the public concerning the utility's service—such as service difficulties and progress in overcoming them, projections of new capacity additions, plans for new or improved means of providing service, and the like.
>
> 1977 Policy Statement at 11.

PSC viewed the inserts as directed to a wide captive audience that must open the bill and be exposed to the inserts. From this, PSC reasoned that a degree of fairness or equal time for proponents of opposing views would have to be required and that this, in turn, would not only be difficult to administer fairly, but also would tend to lessen undesirably the number of bill inserts dealing with such useful and uncontroversial information as consumer conservation measures. These are significant governmental interests properly to be weighed by PSC in regulating utilities.

The third test for a valid time, place, or manner restriction, however, is missing here, for it cannot be said that PSC's ban on use of bill inserts to express views on "controversial issues of public policy" is unrelated to the content of the regulated speech. Indeed, it is precisely because of content—controversial issues—that LILCO has been denied access to bill inserts as a medium for advocating nuclear power. The discussion does not end, however, just because the content of LILCO's speech causes its regulation, or because the PSC ban does not fit

the classic mold of a time, place or manner restriction. A content based restriction was upheld by the Supreme Court in *Lehman v. City of Shaker Heights*, 418 US 298 (1974), in which the Court affirmed a judgment of the Supreme Court of Ohio, that held there was no violation of Lehman's first and fourteenth amendment rights when the city refused to permit the display on vehicles of the city transit system of posters advertising Lehman's candidacy for public office. The city had acted under a policy which permitted commercial advertising on its vehicles, but prohibited any "political advertising". Under that policy the city had not accepted or permitted any "political or public issue advertising." Lehman urged in the Supreme Court that the car cards constituted a "public forum" entitled to first amendment protection regardless of their primary purpose.

Four justices disagreed with Lehman, distinguishing the advertising in public transit vehicles "from the traditional settings where First Amendment values inalterably prevail." 418 US at 302. Writing for the prevailing four, Justice Blackmun noted that American constitutional jurisprudence has been jealous to "preserve access to *public places* for purposes of free speech," but he nevertheless reminded us that "the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question." *Id.* at 302-03 (emphasis supplied). Then, stressing the difference between car card space as an incidental aspect of public transportation and free speech in open spaces, in a meeting hall, in a park, on a street corner, or in a public thoroughfare, he turned his attention to whether the city's policies and practices governing access to the transit system's advertising space were arbitrary, capricious or invidious. He found they were not, because potential revenues could be jeopardized by requiring short term political advertisements, because users would be subjected to the blare of political propaganda, because "there could

be lurking doubts about favoritism," and because "sticky administrative problems might arise in parcelling out limited space to eager politicians." Under those circumstances, Justice Blackmun wrote, "the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation." *Id.* at 304.

Summarizing his view, Justice Blackmun concluded:

> No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation. *Id.* at 304.

Justice Douglas cast the "swing" vote when he concurred in the affirmance because he did not believe "that petitioner has any constitutional right to spread his message before his captive audience." *Id.* at 309.

Writing for the four dissenting members of the court, Justice Brennan argued that Lehman's message was unquestionably protected by the first amendment, that by accepting commercial and public service advertising the city had voluntarily established a forum for communication, and that once a public forum has been established, discrimination-based "*Solely* upon subject matter or content" is prohibited. *Id.* at 316 (emphasis in original). Justice Brennan rejected the distinction between commercial and political advertising because "subject matter or content censorship in any form is forbidden", *id.* at 317, and he found it impossible to draw with accuracy either "the line between ideological and non-ideological speech" or a "manageable line between controversial and non- controversial messages." *Id.* at 319-20. Nor did he accept the

avoidance of "lurking doubts about favoritism" as a justification for excluding political ads when commercial ads were permitted.

Lehman was a close case, perhaps because content restrictions are not favored by the courts. Contrary to LILCO's argument, however, they need not always be justified by state interests that are "compelling". *Lehman* shows that if there is no public forum, then reasonable governmental restrictions on speech may be sustained provided they are not arbitrary, capricious, or invidious. Cf. Tribe, *supra* at 692-93. Such restrictions were upheld in *Connecticut State Federation of Teachers v. Board of Education Members*, 538 F2d 471 (CA2 1976), where the court concluded that school mailboxes, bulletin boards and meeting rooms are not public fora required to be made available to a minority union. And in *Buckel v. Prentice*, 410 F. Supp 1242 (SD Ohio 1976) a school's distribution to parents, via students, of information concerning coming theatrical events, home safety measures and the like, did not establish the "child messengers" as a public forum for first amendment purposes. The court there found that dissemination of such material was a logical and proper extension of the educational function of schools and that it did not "give rise to any right of access to student distribution by parents or other concerned citizens." 410 F. Supp at 1247.

Comparing *Lehman*, itself, with the present case we find many parallels and a few significant differences. In virtually all respects, however, PSC's position is stronger than was that of the City of Shaker Heights.

a. In both cases, there were ample alternate forums available to the speaker.

b. The government's restriction was against "political or public issue advertising" in *Lehman*, and against "controversial issues of public policy" here. Both are content based restrictions aimed at closing the medium to political or controversial messages. However, Justice Brennan's dif-

ficulty in finding a manageable line between controversial and non-controversial messages in *Lehman* may be resolved here through the existing interpretations on cost allocation and the expeditious review procedure promised by PSC.

c. In *Lehman*, the advertising space was owned and regulated by the city, but was offered generally to the public for commercial use. LILCO's mailing envelopes are, of course, owned by LILCO, but regulated by PSC. Historically, LILCO's bill inserts have been messages generated either by LILCO or by PSC, and have not been available for use by the general public at all.

d. Neither the advertising cards on Shaker Heights' busses nor LILCO's bill inserts constitute one of "the traditional settings" where, as Justice Blackmun observed, "First Amendment values inalterably prevail." 418 US at 302. As with the car cards, LILCO's bill inserts involve "no open spaces, no meeting hall, park, street corner, or other public thoroughfare."

e. LILCO is engaged in the commercial activity of providing gas and electric service to the public. Its primary obligation is to provide efficient, economical utility service to Long Island residents under a monopoly franchise that is regulated in the public interest by PSC. Charges for its services are summarized in bills that are mailed in envelopes. From time to time, additional messages to the energy consumer have been included in the bill envelope. At times PSC has required certain messages to be brought to the consumer's attention by that means, and at other times, LILCO has sought to communicate with its consumers directly through the bill inserts. Clearly, what may be included in the billing envelopes is incidental to the basic service functions of both LILCO and PSC, just as providing car card space was incidental to Shaker Heights' function of providing public transportation.

f. In *Lehman*, a major point of difference between Justices Blackmun and Brennan was the former's view that the car cards were not a public forum, and the latter's conclusion that the city's own actions had turned the car cards into a public forum. PSC here, by this very regulation, is helping to prevent the bill inserts from becoming a public forum that would subject them to the strict scrutiny necessary for constitutional operation.

g. Shaker Heights' justifications for prohibiting political or public issue messages on its car cards were that the limitation on access to the advertising space would minimize (1) chances of abuse, (2) the appearance of favoritism, and (3) the risk of imposing upon a captive audience. All were accepted by Justice Blackmun as reasonable legislative objectives. Essentially similar justifications have been offered by PSC for keeping controversial issues of public policy out of utilities' bill inserts: (1) the risk of imposing on a captive audience, (2) the appearance of favoritism toward utilities' views on controversial issues, (3) the difficulties inherent in counteracting that appearance by permitting other points of view, and (4) the inevitable charges of improper conduct when PSC is placed in the position of an arbiter of fairness on controversial views, many of which may be far removed from matters of utility management and regulation.

In addition to the foregoing, however, PSC has two more justifications to add to its side of the balance. It seeks to protect the bill insert medium from over-use so that it may be preserved for important and useful information which PSC deems necessary for the consumer to use the utilities' services efficiently, economically and safely. In addition, PSC clearly seeks to avoid making a "public forum" out of the bill inserts, and thereby to steer clear of the issue that so sharply divided the Court in *Lehman*. As the Supreme Court found in *Police Department of Chicago v. Moseley* 408 US 92, 96, 92 SCt 2286,

2290 (1972), "once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." Since substantial constitutional and administrative consequences would flow from a determination that a particular medium of communication qualified as a "public forum", surely PSC may limit use of the billing mechanism so that it does not become such a forum. In this way PSC could avoid being enmeshed in a wide variety of issues and considerations that are not directly related either to the regulatory responsibilities of PSC or to the business of the utilities it regulates.

In short, on this issue, the Supreme Court in *Lehman* upheld against a first amendment challenge a governmental prohibition against "political and public issue advertising" on rapid transit vehicles. *A fortiori*, PSC's ban of "controversial issues of public policy" from the bill inserts of New York public utilities does not infringe the first amendment.

VI. Conclusion

On the promotional advertising issue, LILCO is entitled to judgment (a) declaring that the Statement of Policy on Advertising and Promotional Practices of Public Utilities, issued by defendant PSC on February 25, 1977, and all subsequent implementing orders of the PSC, to the extent that they prohibit plaintiff LILCO from truthful promotional advertising of electric space heating, violate the first amendment and are, therefore, unconstitutional, and (b) enjoining PSC from enforcing the prohibition.

On the bill insert issue, PSC and the intervenor defendants are entitled to judgment declaring that the portion of the order issued by PSC on February 25, 1977 that reads "all utilities subject to the jurisdiction of this Com-

mission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy," does not infringe LILCO's rights under the first and fourteenth amendments to the United States Constitution.

The Clerk shall enter judgment accordingly.

SO ORDERED.

Dated: Westbury, New York
March 30, 1979.

/s/ GEORGE C. PRATT
GEORGE C. PRATT
U. S. District Judge

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

77 C 972

LONG ISLAND LIGHTING COMPANY,

Plaintiff,

—against—

THE NEW YORK STATE PUBLIC SERVICE COMMISSION; ALFRED E. KAHN, as Chairman of the New York State Public Service Commission; EDWARD BERLIN, as Deputy Chairman of the New York State Public Service Commission; and HAROLD A. JERRY, JR., EDWARD P. LARKIN, CARMEL CARRINGTON MARR, ANNE MEAD and CHARLES A. ZIELINSKI, Members of the New York State Public Service Commission,

Defendants,

SCIENTISTS' INSTITUTE FOR PUBLIC INFORMATION, NATURAL RESOURCES DEFENSE COUNCIL, INC., FRIENDS OF THE EARTH, CONSUMER ACTION NOW, JOAN MCCALL and SUSAN MAINWARING,

Intervenors.

JUDGMENT

A memorandum and order of Honorable George C. Pratt, United States District Judge, having been filed on March 30, 1979, declaring that the Statement of Policy on Advertising and Promotional Practices of Public Utilities issued by defendant THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) on February 25, 1977, and all

subsequent implementing orders of THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) to the extent that they prohibit plaintiff LONG ISLAND LIGHTING COMPANY (LILCO) from truthful promotional advertising of electrical space heating, violate the first amendment and are, therefore, unconstitutional, and, further, enjoining THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) from enforcing the prohibition;

And aforesaid memorandum and order, also declaring, on the bill insert issue, that the portion of the order issued by THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) on February 25, 1977, that reads "all utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy," does not infringe plaintiff LONG ISLAND LIGHTING COMPANY's (LILCO) rights under the first and fourteenth amendments to the United States Constitution, it is

ORDERED and ADJUDGED that plaintiff LONG ISLAND LIGHTING COMPANY (LILCO) have judgment declaring that the Statement of Policy on Advertising and Promotional Practices of Public Utilities, issued by defendant THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) on February 25, 1977, and all subsequent implementing orders of THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC), to the extent that they prohibit plaintiff LONG ISLAND LIGHTING COMPANY (LILCO) from truthful promotional advertising of electric space heating, violate the first amendment, and are, therefore, unconstitutional, and that defendant THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) is enjoined from enforcing the prohibition;

IT IS FURTHER ORDERED and ADJUDGED that defendant THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC)

and the intervenor defendants have judgment declaring that the portion of the order issued by THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) on February 25, 1977 that reads "all utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy," does not infringe plaintiff LONG ISLAND LIGHTING COMPANY's rights under the first and fourteenth amendments to the United States Constitution.

Dated: Westbury, New York
March 30, 1977

/s/ _____
Clerk

/s/ _____
Deputy Clerk

Approved:

/s/ GEORGE C. PRATT
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

77 Civ. 972

LONG ISLAND LIGHTING COMPANY,

Plaintiff,

—against—

THE NEW YORK STATE PUBLIC SERVICE COMMISSION *et al.*, *Defendants.*

MEMORANDUM AND APPEAL

PRATT, J:

Defendant New York State Public Service Commission (PSC) has moved, pursuant to FRCP 52(b), for the court to amend or make additional findings of fact in connection with the memorandum and order of March 30, 1979, declaring that PSC's ban on New York utilities' promotional advertising of electric space heating violates the first amendment. In addition, PSC seeks a stay of the court's order pending determination of the Rule 52(b) motion and appeal. Plaintiff Long Island Lighting Company (LILCO) opposes PSC's motion and the request for a stay.

As grounds for the Rule 52(b) motion, PSC argues that the court, in its March 30, 1979 opinion, "omitted or misconstrued certain material facts supporting state interests" that PSC had alleged. Specifically, PSC asserts (1) that the court, did not account for the constant availability of base load generating facilities during the winter

months, and their increased oil usage to generate more electricity; (2) that the court erred in stating that the PSC has not barred utilities from advertising the merits of gas fired space heating; (3) that the court omitted certain factual allegations by PSC concerning the effect of promotional advertising on electric rates; (4) that the court did not address the impact on consumers of improperly structured rates stemming from promotional advertising; and (5) that the court failed to discuss PSC's allegation that promotional advertising of electric space heating would stimulate a general rise in demand for electricity, thereby obstructing efforts by PSC and utilities to conserve energy. PSC also argues that the court was incorrect in concluding that the factual issues raised by PSC are relevant to direct regulation of electric heat, but not to promotional advertising of electric heat.

While PSC argues that the court "omitted or misconstrued" certain facts, the decision reveals that the court assumed, for purposes of the decision, that promotional advertising *would* increase the demand for electricity, *would* require use of more oil to generate the electricity, and *would* have an effect on electric rates. With respect to the claim that there would be an adverse effect on consumers because of rates which had been improperly structured by the PSC, the court assumed that it was within the power of the state, either through the PSC or the legislature, to restructure the rates should that be necessary.

With respect to utility advertising of gas fired heating, the court erred in stating that the PSC has not barred such advertising, but the court does not consider this fact to be dispositive of the underlying issue in this aspect of the case; whether PSC may do indirectly, through a ban on promotional advertising, that which it has thus far chosen not to do directly, that is, restrictions on usage of electricity. Thus, except for the gas advertising ban, each of the "omitted" facts that PSC asserts on this motion was considered by the court and either weighed in

evaluating PSC's interests, or deemed irrelevant or immaterial to a ban on advertising, as opposed to a restriction on use. The Supreme Court decisions relied upon in the March 30 decision make it clear that an otherwise entirely lawful commercial activity may not be regulated indirectly by prohibiting truthful advertising to consumers about that activity.

The factual issues referred to by PSC go to the merits of direct regulation of electric space heating, and, therefore, are not material to a decision on LILCO's first amendment rights in the promotional advertising of such an activity. PSC's motion pursuant to FRCP 52(b) is, therefore, denied, and PSC's request for a stay pending determination of the motion is denied as moot.

PSC seeks, in addition, a stay of the court's March 30, 1979 order pending appeal to the Second Circuit. Under FRCP 62(c), the district court may, in its discretion, stay the effect of an injunction during the pendence of an appeal. The ban of which LILCO complains and now has had invalidated was imposed in 1973. LILCO waited until 1977 to challenge that ban in this action. The questions presented are of significant public importance, and it does not appear that LILCO will suffer any significant injury if its promotion of electric heat is delayed another few months in addition to the five years it took for the issue to be submitted to this court for determination. Accordingly, the request for a stay pending appeal of that portion of the court's judgment which enjoined enforcement of the ban on promotional advertising of electric heat is granted on condition that PSC diligently prosecute the appeal.

Finally, in the court's memorandum and order of March 30, 1979, lines 15-16 on page 5 (Part II, C. State Court Proceedings) is hereby amended to read as follows: "Third Department affirmed on the promotional advertising issue, and reversed on the bill insert issue * * * ."

SO ORDERED.

/s/ GEORGE C. PRATT
GEORGE C. PRATT
United States District Judge

Dated: Westbury, New York
April 16, 1979

Supreme Court, U.S.
FILED
JAN 11 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979 No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

BRIEF AMICI CURIAE FOR MID-ATLANTIC LEGAL FOUNDATION AND DONALD POWERS IN SUPPORT OF THE APPELLANT

On Appeal from the Court of Appeals of the State of New York.

Edward H. Dowd
Attorney for the Amici Curiae
NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST
Suite 810
1101 North 17th St. N.W.
Washington, D.C. 20036
(202) 296-1683

Of Counsel:
Myrna P. Field
John G. Collins
MID-ATLANTIC LEGAL FOUNDATION
Suite 600
1521 Locust Street
Philadelphia, PA 19102
(215) 545-1913

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

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CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
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Appellee.

BRIEF AMICI CURIAE FOR MID-ATLANTIC LEGAL FOUNDATION AND DONALD POWERS IN SUPPORT OF THE APPELLANT

On Appeal from the Court of Appeals of
the State of New York.

INTEREST OF THE AMICI CURIAE

Pursuant to this Court's Rule 42, Mid-Atlantic Legal Foundation and Donald Powers hereby move the Court for leave to file the attached brief as *amici curiae*. Consent was secured from counsel for both parties. Copies of these letters have been filed with the Court.

Mid-Atlantic Legal Foundation is a nonprofit, tax exempt corporation organized and existing under the Laws of Pennsylvania and active in a six-state region which includes New York. It was organized for the purpose of engaging in litigation in matters affecting the broad public interest. Mid-Atlantic Legal Foundation has already filed an *amici* brief with other parties in the companion case to this one, *Consolidated Edison Company of New York, Inc. v. Public Service Commission of the State of New York, Supreme Court of the United States, October Term, 1979, No. 79-134.*

This *amici* brief is also presented on behalf of a recipient of Central Hudson's electricity services who would like to continue to hear about the further utilization of electricity in his residence.

Mr. Donald Powers is a retired person who receives and pays appellant's utility bills at his residence in Cold Stream, New York.

Amicus, Mid-Atlantic Legal Foundation, files this brief because of its belief that our predominantly free enterprise economic system is an essential foundation of our republic and that the Court's recognition of the values of the free flow of commercial speech in that free enterprise system should continue to be carefully molded in the interest of all the public. *Amicus,* Donald Powers, files this brief because as a user of Central Hudson's services, he wishes to know the additional services Central Hudson may have to offer in competition with others, all economic alternatives available to him as he attempts to cope with his fixed income and the environmental and inflation ramifications of those alternatives.

SUMMARY OF THE ARGUMENT

The Court's decisions on commercial free speech have carefully defined a high level of state interest and serious dangers to the public from the speech at issue in order to justify abridgement of First and Fourteenth Amendments. In those cases striking down commercial speech prohibitions, it has carefully set forth those types of dangers.

The New York Public Service Commission ("PSC") has not shown a compelling or other sufficiently high level of state interest to justify its total content-oriented ban. Claimed cost justifications are either plainly irrelevant or marginal. Environmental considerations are likewise marginal. As important as energy conservation is as a national objective, the banner of the "energy crisis" is not enough to define a sufficient state interest in the context of the First Amendment rights abridged, because the Order is a complete ban which suppresses competition, because it removes from Central Hudson's customers the right to make their own economic decisions in respect of competing petroleum-using alternatives and, lastly, because the impact of the Order on energy conservation will, in fact, be minimal.

The Court of Appeals erred in its application of First Amendment law by failing to properly consider the competitive marketplace in which the proposed advertising would speak, by misapplying a decision involving "time, place or manner" restriction to the blanket ban at issue here, and by giving summary treatment to the issue of the level of state interest by taking judicial notice of the "energy crisis" without properly evaluating its meaning and ramifications as applied to the Order.

ARGUMENT

I. THE ORDER OF THE PUBLIC SERVICE COMMISSION UNJUSTIFIABLY ABRIDGES APPELLANT'S CONSTITUTIONAL RIGHT TO ENGAGE IN TRUTHFUL PROMOTIONAL ADVERTISING AND THE CONSTITUTIONAL RIGHT OF THE PUBLIC TO RECEIVE IT.

A. Appellant ("Central Hudson") wishes to promote by advertising the use of its electricity for which it has both summer-on-peak and winter-off-peak capacity. The parties apparently agree that such advertising in the foreseeable future would be limited to promoting electricity resulting from the installation of heat pumps. The PSC has ordered Central Hudson and all New York electric utilities not to engage in any such advertising and to remain silent. "[T]his order works a direct curtailment of expressional activity: an entire category of speech is prohibited . . ." In the matter of *Central Hudson Gas & Electric Corp. v. Public Service Comm.*, 47 N.Y. 2d 94, 107, 417 N.Y.S. 2d 30, 37 (1979). (App. 1a, 10a).[1]

This Court's recognition of rights to First Amendment protection for commercial speech has been articulated only recently. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Linmark Associates, Inc., v. Township of Willingboro*, 431 U.S. 85 (1977); *Carey v. Population Services International*, 431 U.S. 678 (1977); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Ohralik v. Ohio State Bar*

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1. Appendix references (App.) are to that of Appellant's Jurisdictional Statement.

Association, 436 U.S. 447 (1978), (collectively, "the 1970s cases").[2]

Although recently articulated, First Amendment protection is not the grant of a new right. Rather, the 1970s cases are current recognition of rights existing since, and grounded in, the Constitution itself. (Compare *Valentine, Chrestensen*, 316 U.S. 52 (1942) and *Bigelow v. Virginia*, 421 O.S. at 819, 820 n. 6). Those rights are "among the fundamental and personal rights and "liberties" protected by the [First and] Fourteenth Amendment[s] from impairment by the States." *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

The principles and interests underlying the commercial speech First Amendment rights of speaker, recipient, and society were clearly set forth in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. at 762-765:

> [W]e may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment. (762)
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> * * *
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> As to the particular consumer's interest in the free flow of commercial information, that interest may

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2. Apparently the Parties and courts below have treated appellant's proposed promotional advertising as strictly commercial speech, akin to the offer of sale at a price in *Virginia Pharmacy, supra.* Certainly, if the ads included advice on conservation, as amici are confident they would, the "speech" would include non-commercial information akin to that of the abortion availability ads of *Bigelow v. Virginia, supra.* Further, even purely promotional language will necessarily be part of the current public debate in the economic, social and political arenas involving the interrelated issues of energy uses and sources, inflation, environment and nuclear power. They therefore will be of inherent public interest and labelling and treatment of them as "commercial" may be inappropriate, particularly if a significantly lesser First Amendment protection might otherwise be accorded them.

> be as keen, if not keener by far, than his interest in the day's most urgent political debate. (763)
>
> * * *
>
> Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest. (764)
>
> * * *
>
> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. (765)

The PSC's order goes to the content of the proposed advertising itself and is a complete prohibition.[3] The First Amendment requires exacting scrutiny of state-imposed restrictions. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Buckley v. Valeo*, 424 U.S. 1, 16 (1976); *Bigelow v. Virginia*, 421 U.S. at 820; *New York Times Co. v. Sullivan*, 376 U.S. at 266. Where the prohibition is directed at speech itself. "the State may prevail only

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3. It should be noted that the effect of this particular ban goes beyond the promotional advertising, *per se*. Unlike the pharmacists in *Virginia Board* or the attorneys in *Bates* or *Ohralik*, for examples, Central Hudson is not free to engage in public comment, whether in the form of institutional ads or otherwise, which would be critical of the PSC's position as a political matter or which would be designed to gain public support for permission to engage in promotional advertising. The comment itself might well promote heat pumps and electricity.

upon a showing of a subordinating interest which is compelling," *First National Bank of Boston*, 435 U.S. at 786; *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); "and the burden is on the government to show the existence of such an interest." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). It is not the citizen who must justify his speech, *First National Bank of Boston*, 435 U.S. at 784, but the state which must justify its abridgement by a showing of a compelling interest.

To sustain that burden of justification the state must show that the protected "speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State may seek to prevent . . ." And the danger apprehended must be sufficiently "imminent that it may befall before there is opportunity for full discussion." *Whitney v. California*. 247 U.S. 357, 373, 377 (1927). That the standards of *Whitney* apply to Commercial speech cases which result from content-oriented regulations was recognized in *Linmark Associates, Inc. v. Willingboro*, 431 U.S. at 97.

The Court has observed in *Ohralik v. Ohio State Bar Assn.* that in recognizing that commercial speech is to be accorded First Amendment status, it has been careful to note the "common-sense" differences between commercial and noncommercial speech and that it had "afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." (436 U.S. at 455, 456).

The "limited measure" and "subordinate position" remain to be precisely defined. At present, they indicate only the generality of some discount from the starting point standards of *Bellotti, Bates v. Little Rock, Elrod v. Burns* and *Whitney v. California.*

And, of course, throughout the development of the 1970s cases, this Court has explicitly recognized that in

proper circumstances such speech, as all speech, may be regulated. The decisions have been careful to point to, however, if not completely define, the kinds of advertising dangers which justify regulation. They are: "time, place or manner"[4] (*Virginia Board, Carey, Bates v. State Bar of Arizona*); false, misleading, deceptive or fraudulent (*Bigelow, Virginia Board, Willingboro, Carey, Bates v. State Bar of Arizona*);[4] invasion of privacy or speech to a captive audience (*Bigelow*); illegal product or service or promotion of an illegal scheme (*Bigelow, Virginia Board, Carey, Bates v. State Bar of Arizona*).

No such dangers exist in the case at bar. Central Hudson merely wishes to engage in truthful promotional advertising in a competitive market so that the New York public in that market can make informed economic decisions they have the constitutional right to make.

B. The PSC has not justified its abridgement. The Court of Appeals has decided that the PSC has the power to issue its order. But that power, given by the legislature to a state agency, does not decide the question whether the state has a compelling interest sufficient to strike down a constitutional right by a total speech ban.

For the purposes of First Amendment analysis, the PSC's order is premised on an important inconsistency, contains an arbitrary selection of priorities and is founded on economic and operating considerations which are marginal in the aggregate.

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4. *Ohralik* itself involved misleading communications against a background of serious professional misconduct and upheld a "time, place, or manner" regulation. After *Ohralik*, Ohio lawyers are free to advertise but not to engage in face to face solicitation. Nor are the additional forms of regulated communications mentioned in *Ohralik*, 436 U.S. at 456 anything new. Securities laws are disclosure statutes which proscribe misleading communications. The exchange of price and product information fosters illegality, *i.e.*, price fixing. Employer threats of retaliation are commercially analogous to threats of physical harm.

1. The original 1973 ban on promotional advertising was issued within weeks of the Arab oil embargo which created a dramatic and immediate oil shortage. New York utilities did not have, and could not get at any price, sufficient oil to fulfill their current demand. In the language of that order, the situation was an "impending emergency [which] because of the immediacy of the problem . . . [required] direct control necessary to avert a disaster." (App. 26a). That is First Amendment abridgement language which may describe a sufficient State interest in the promotional advertising ban which resulted.

The 1977 order at issue here does not even pretend to define such an emergency. Rather, it points to a long-term problem of the nation's over-dependence on foreign oil and concludes lamely that the PSC thinks "it is reasonable to believe [that its ban] will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales." (App. 37a). No measurement of the quantum of that reduction is given.

The PSC's own language is tantamount to an admission by it that no impending danger or emergency exists sufficient to justify a total speech repression.

2. After acknowledging the many infirmities underlying its order, the PSC concluded "conservation of energy remains our highest priority." (App. 37a). The PSC does not tell us why it subordinated such interrelated issues as economy, efficiency, inflation. stagflation and environmental concerns or why it apparently saw fit not to balance short-term conservation against those other serious national problems or with long-range programs for conservation and environmental control before imposing a complete promotional advertising ban. Such failures reflect arbitrary action by the PSC violating §5-2 of its own enabling act. *N.Y. Public Service & Law* (McKinney) (Supp. 1978).

3. The PSC's claimed interest appears to be based on three factors none of which either singly or in the aggregate withstand First Amendment analysis.

a. Costs. The claims are that (1) rates do not cover the marginal costs of new capacity, and (2) electrical costs are spiraling in substantial part due to pressures for increased capacity. Both claims are pure diversions.

(1) Marginal costing seeks to assign to users of new capacity the incremental cost directly attributable to that new capacity. Central Hudson seeks to promote existing excess and idle capacity, both summer-on-peak and winter-off-peak.

(2) The upward pressure on electrical costs resulting from increase demand may be expected to continue despite the ban. While Central Hudson sits silent, builders of both industrial and residential buildings and manufacturers of air-conditioning equipment will be pushing their products and the public itself may be expected to continue to desire them without regard to winter-off-peak heating.

The fact is that the proposed promotion would work cost and inflation benefits which the PSC acknowledged but cast aide: "development of off-peak load would likely result in a lowering of the unit cost of electricity, due to greater utilization of existing plant, with a resulting downward pressure on, or at least a stabilization of, present rates." (App. 36a).

b. Environment. The claim of the PSC majority was that "[i]ncreased off-peak generation, however, . . . creates incremental air pollution and thermal discharges to waterways." (App. 37a).

Commissioner Kahn, however, had a different view of the environmental effects when he considered the alternative, heating oil: "I must point out . . . that the three for one comparison grossly exaggerates . . . because it fails to take into account . . . the lesser injury to the environment

from combustion of oil in electricity generation than, alternatively, in thousands of separate furnances . . ." (App. 50a).[5]

Mr. Kahn also pointed out that the three for one comparison failed to take into account the energy cost of home fuel oil delivery which also has the environmental effect of further eroding air quality because of increased automotive emissions.

As is the case with much of the record, the environmental considerations lack precise measurement.[6] Although they probably favor promotion of electrical heating, it is clear for First Amendment, state interest analysis, that any detriment would be marginal.

c. Conservation was the factor most relied on by both the PSC and the Court of Appeals. We have already pointed out (1) the different conditions which existed in 1973 from those at the time of the instant order and (2) the inability of the PSC to control demand.

The conservation platform of the order reads: "The increased requirement for fuel oil . . . created by promotional advertising would aggravate the nation's already unacceptably high level of dependence on foreign sources of supply . . . conservation of energy remains our highest priority . . ." (App. 37a).

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5. Amici take no position in opposition to petroleum processors or home heating oil distributors. They have as much right to promote home heating oil as do the electric utilities to promote their product. Their position may prove more or less successful and more or less meritorious. But the relative merits of the two groups of suppliers and the two forms of product only define the issues: (1) who is to make the choice, the state or the consumer; and (2) should the speech of one be silenced by the State but not that of the other.

6. Amici are informed that at least two participants in the 1977 proceedings urged the PSC to conduct evidentiary hearings but that was not done.

Analysis of that platform for First Amendment purposes not only fails to support a finding of a compelling state interest justifying total suppression of promotional advertising, it is fatal to such a finding.

The nation, as well as New York, is confronted with an energy problem. Petroleum is believed to be in long-term short supply and substantially controlled by foreign nations. The supply-demand ratio has allowed world prices to increase, fueling inflation.

Solutions, such as use of coal, coal gasification. solar and nuclear energy have not yet been completely proven or accepted and are matters of primary current public attention and debate.[7] At the same time, the nation's demand for oil-fired energy continues, the lion's share derived from gasoline and petrochemical uses.

This situation may define a national interest in encouraging and promoting petroleum conservation. However, with few exceptions relating to short term gasoline rationing, neither the national nor state governments have sought to impose mandatory reductions in use.

In particular, none has attempted to effect such reductions by means of bans on speech.

It is against this background that the PSC invokes the "nation's" problem to impose "piecemeal-conservation,"

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7. The PSC acknowledged that incremental generation of electricity fired by coal or uranium would affirmatively assist in making this "country" more independent of foreign oil suppliers (and conserve) but threw out this consideration as another side effect on the ground that "most of these major companies" would not use such fuels at this time. (App. 37a).

Mr. Kahn suggested that "apparently" all summer-on-peak companies would use oil "for several years." (App. 49a). But Central Hudson wishes to promote "at present" and for the next "several years" electricity which will require installation of equipment which will last for 20 years. So will that of its competitors, the fuel oil companies.

which it hopes will have "some dampening" effect on "society's total energy requirements . . ." (App. 37a).[8]

The PSC can control only New York State utilities, not sellers of air-conditioning equipment or home heating oil companies, let alone all those in the nation who continue petroleum demand in all its forms. This conservation effort will have *de minimis* impact.[9]

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8. The starting inefficiency of electric as against oil home heating is also at most marginal, as Commissioner Kahn pointed out:

> [T]he three for one comparison grossly exaggerates the relative inefficiency . . . because it fails to take into account the energy costs of delivery of oil to the various points of consumption; the far less than 100% efficiency with which oil is typically burned in furnaces; . . . and the promise of the heat pump sharply increasing the efficiency of the use of electricity for heating. (App. 50a).

Indeed, *Amici* understands the position of Central Hudson to be that when the heat pump is installed it is not at all inefficient as against oil heating but is energy competitive or more efficient.

9. *Amici* are informed that by the most conservative estimates it could fairly bring to bear, including conversion factors favorable to oil heat which it does not accept as fact, Central Hudson has estimated that if every new home built in New York State in 1978 had installed resistance electric space heating, oil consumption in the State would have increased by 9/100 of one percent. Central Hudson does not even wish currently to advertise resistance space heating.

Based on the same conservative assumptions, if all new homes in the state installing heating systems involving the election between heating oil and heat pumps had installed the pumps, Central Hudson estimates that the resulting increased oil consumption from the use of heat pumps for winter heating would have been 9/10,000 of one percent.

Further, if all those new homes had installed heat pumps and they used the pumps for summer air conditioning at average usage rate, the increased oil consumption would be less than 4/100 of one percent. This last figure assumes that all the homeowners involved would not have otherwise installed air conditioning—an assumption grossly contrary to current human experience.

That impact cannot reasonably be regarded as a compelling state interest justifying elimination of First Amendment rights.

4. Misleading signals. The PSC's claim is that Central Hudson is incapable of creating a truthful promotional advertisement which will not give "totally misleading signals that conservation is unnecessary." (App. 57a).[10]

The sample ad of footnote 10 could not reasonably be construed as giving "misleading signals" concerning the necessity of conserving petroleum.

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10. Although advertising amateurs, *amici* have created the following sample ad:

> Energy conservation, particularly petroleum conservation, is one of the most important national and New York concerns. It is essential that every person and company conserve. Existing uses should be cut down and new energy uses must be avoided.
>
> Air-conditioning is a heavy user of electricity which is generated in part from petroleum. If you now have air conditioning you should cut down or eliminate its use. If you do not have air conditioning Central Hudson and the New York Public Service Commission urge you not to install it, either in your present home or in any new one should you be moving or building.
>
> If despite our warnings about the urgent necessity of conserving petroleum you should find it necessary to install air conditioning anyway, then we would suggest you consider installation of an electric heat pump for the winter months. While the air conditioning part of your system will use additional oil-fired electricity, the heat pump feature will probably not add any more to petroleum use than a home heating oil system will and the heat pump will help keep down the costs of electrical service by allowing us to use the idle generating capacity we have in the winter months. The installation of the heat pump will yield a lower overall energy bill than the installation of an oil burner.
>
> Again, we urge our customers not to install air conditioning. If you decide you must, however, please phone your local heat pump dealer or call us.

Moreover, given the stated objective, one must question whether the PSC order will not be counterproductive. It has removed from the market the one regulated advertiser. It has left therein, as it must, the unregulated sellers of air conditioners, home fuel oil, fuel oil furnaces and heat pumps.

C. On the side of free speech lie the interests of the advertiser and its recipient-consumers. Central Hudson wishes to do no more than truthfully promote the use of its existing capacity for its benefit and that of its customers. It has a constitutional right to do so.

The recipient-consumers have an equal right to know the facts so that they can make informed choices. Typically, against the background of his economic resources and his own chosen or circumstance-dictated life style, he has faced and will continue to face and evaluate innumerable economic choices relating to energy and the future.

The utility customer has a right to know the benefits to be derived from using electric heat and heat pumps in the winter as well as to be apprised of its deficiencies. In this particular market, two related facts stand out. First, he will be subject to the sales or advertising efforts of others. Second, if the price of petroleum continues to increase as a result of arbitrary OPEC action or as a result of continuing increased petroleum demand from sources not within the PSC's control, the economic advantages of the heat pump will also increase, at least where the citizen has already decided to install air conditioning.

These latter considerations make it even more inappropriate to suggest that the issue is subject to competition between the state and its citizens for the right to make the choices or that the state is somehow better equipped to make them. That type of state protectiveness of its citizens resting in large measure on advantages of their being kept in ignorance, the Court rejected in *Virginia Pharmacy Board*:

> [I]t is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance.
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> * * *
>
> It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers.
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> * * *
>
> There is . . . an alternative to his highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But the choice among these alternative approaches is not ours [the PSC's or the Court's] to make or the Virginia [New York] Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. 425 U.S. at 769-770.

In *Bates v. State Bar of Arizona* the court rejected similar protection arguments which it viewed as resting on an underestimation of the public. 350 U.S. at 374-375.

If the public has a right to filter and handle information on some but not all lawyer services, services most citizens infrequently use, surely it has a right to read Central Hudson's promotional messages concerning energy on which it makes almost daily consumption and investment decisions.

Nor can the availability of the constitutional rights of Central Hudson and the public be limited by arguing that the number of citizens' decisions concerning heat pumps will be small. (PSC's Motion to Dismiss Appeal, p. 13.).

First, whatever their number, the decisions will be made as one of a large number of continuing economic decisions reserved to the public, not the state. Second, the argument is an admission, in fact, that the order will have *de minimis* effect.

Moreover, this argument pinpoints the most serious danger inherent in the PSC position, *viz*, the thought with which Americans have become all too familiar, that the invocation of the "vast power of the Public Service Commission" given by the state (the legislature) to itself (the PSC) is self-justified because the power is used against only one company or a narrow group of companies or a small number of citizens; it is only a little abridgement. The abridgement of a constitutional right is never little, and must be clearly, carefully and seriously justified, no less so, but perhaps more so, because it involves our competitive, free enterprise economy.

Finally, the PSC cannot (1) pretend that the order speaks to a monopoly in a noncompetitive market or (2) suggest that equipment dealers provide alternative means for the public to be advised (See, Motion to Dismiss Appeal, p. 15), or (3) suggest that the ban is only a "time, place or manner" regulation (See, Motion to Dismiss Appeal, p. 15).

(1) Monopoly status is granted to electric utilities to eliminate competition in the supply of electricity only. In fact, electricity and heating oil compete. That competition not only cannot be ignored, it is an essential part of this First Amendment case. As Commissioner Kahn observed:

> I also believe in competition as a form of economic organization, wherever it is feasible. And for competition to be effective, some sales promotion is necessary. Even if that were not so as a general matter, it would in my judgment be inescapably so when there compete in the market two rivals, one of whom is free to advertise his wares and other is—under our present policies—not. (App. 49a).

(2) Electric equipment suppliers do not provide alternates to the information carried in Central Hudson's promotional ads. Central Hudson has a right to offer its electricity publically utilizing the known data as it wishes. Manufacturers and dealers may know and use some of the same information, *e.g.*, pump capacities. Central Hudson may have other data known only to it which is essential to its presentation, *e.g.*, that excess capacity continues to exist.

A third category of information exists as to which the utility has better and more information available, *e.g.*, daily oil prices and trends.

Moreover, if conservation be the objective, the suggestion borders on the irresponsible. At a minimum, it ignores the common interests of Central Hudson and those manufacturers and dealers in competition with heating oil distributors and leaves Central Hudson's efforts at odds with the heat pump dealers in the market place (one says conserve, the other doesn't), a result more likely to cause "misleading signals" than the balanced and restrained advertising Central Hudson proposes and to which it has a constitutional right.

(3) The order cannot be remolded into a "time, place or manner" regulation as the PSC may now be suggesting when it asserts that "[h]ome builders (and anyone else) are free to talk to Central Hudson about the costs and benefits of electric heat. . . . Central Hudson . . . remains free to provide advice to customers if they request it." (Motion to Dismiss Appeal, pp. 13, 15).

The suggestion has several legal and practical infirmities (a) Answering questions which may or may not be asked simply is not promotion of sales. The order remains a complete content control;

(b) It ignores the right of the public to receive the proscribed communications;

(c) It invites Central Hudson to do by active indirection what it is prohibited from doing directly; therefore,

(d) As a practical matter the asserted freedom simply does not exist in any meaningful way because a responsible, regulated company will properly be concerned with whether a customer(s), manufacturer(s), dealer(s), or most important the PSC, will think or determine that a conversation or exchange of correspondence, or an aggregation thereof, has amounted to promotional advertising or a course of conduct designed to subvert the order.

The proposed advertisements simply involve truthful advertising promotion of legal products and services and are not in any way parallel to any conduct proscribed by prior decisions.

In sum, the order is constitutionally defective. The PSC has no legitimate, or compelling interest in suppressing all Central Hudson's promotional advertising. There is a recognized national problem affecting every citizen but there is no emergency justifying the imposition of blanket silence on one narrow segment of the population and the suppression of competition. The asserted justifications, cost, environment and energy, are either irrelevant, marginal, or with respect to the energy conservation claim of *de minimis* impact. Evils which might be perceived in the commercial advertising just don't exist and the perception of "misleading signals" is hypothetical and plainly wrong. Even if a trace of validity could be conceived, it would be susceptible of post-publication correction; and most important, there is no justification for usurping from the New York public the energy related economic and social decisions which are theirs to make.

II. THE COURT OF APPEALS ERRED IN ITS APPLICATION OF FIRST AMENDMENT LAW TO THE PSC's ORDER.

The Court of Appeals erred in two major respects:

First, it misconstrued the 1970s cases as applied to *Ohralik* and then misconstrued and misapplied *Ohralik*.

1. Although the Court of Appeals recognized that the PSC's order was a complete content ban on all promotional advertising, it failed to perceive that *Ohralik* involved a "time, place or manner" restriction. As earlier noted, after *Ohralik*, Ohio lawyers are free to engage in advertising. Only face to face solicitation is barred.

2. *Ohralik* did not place primary emphasis on the importance of the free flow of information but on the dangers inherent in face to face lawyer solicitation which, it concluded, was so likely to result in misrepresentation and the exclusion of objective information that it warranted regulation. All of the 1970s cases recognized that "time, place or manner" regulation might be justified in a proper case or that misleading communications could be subject to regulation.

That is not the case here. Central Hudson's promotional advertising contains none of the dangers which the 1970s cases recognized to be subject to regulation and it is certainly opposite to the face to face communication which *Ohralik* banned.

3. *Ohralik* does not suggest that when the free flow of commercial information "is diminished," First Amendment protection reaches "its nadir." *Ohralik* involved serious professional misconduct, comprising a high degree of public danger, as well as inherent misrepresentation. The precise levels of First Amendment protection in commercial speech cases remains to be defined as factual patterns are presented.

Second, the court failed to accord the order the exacting scrutiny required by the First Amendment and erred in the scrutiny in which it did indulge:

> In view of the noncompetitive market in which electric corporations operate, it is difficult to discern how the promotional advertising of electricity might contribute to society's interest in "informed and reliable" economic decisionmaking. Consumers have no choice regarding the source of their electric power; the price of electricity simply may not be reduced by competitive shopping. At best consumers may seek, through the Public Service Commission, to limit future increases in electrical prices. Surely promotional advertising would provide no information of assistance in this respect.
>
> Indeed, promotional advertising is not at all concerned with furnishing information as to the "availability, nature, and prices" of electrical service. It seeks, instead, to encourage the increased consumption of electricity, whether during peak hours or off-peak hours. Thus, not only does such communication lack any beneficial informative content, but it may be affirmatively detrimental to the society. It would not strain the bounds of judicial notice for us to take cognizance of the present energy crisis. Conserving diminishing resources is a matter of vital state concern and increased use of electrical energy is inimical to our interests. Promotional advertising, if permitted, would only serve to exacerbate the crisis. In short, this constitutes a compelling justification for the ban. *In the matter of Central Hudson Gas & Electric Corp. v. Public Service Comm.*, 47 N.Y. 2d at 110, 417 N.Y.S. 2d at 39, (App. 13a-14a).

1. The Court of Appeals totally ignored competition between electric utilities and home heating oil dealers. It

failed to perceive and, therefore, evaluate for First Amendment purposes, the market place to which the ads would be directed, and the proper interests of Central Hudson and of citizens in that market place.

2. It concluded somehow that promotional advertising isn't promotional advertising, *i.e.*, concerned with availability, nature and prices of electrical service. The contrary is true. The disputed ads would be premised on the availability of capacity, the nature of the service, *i.e.*, electrical heat as against oil heat, the price, and the downward pressure on rates resulting from use of idle capacity, a beneficial effect as even the PSC admitted.

From the foregoing erroneous premise and its corollary that all promotional advertising seeks to do is to encourage increased electrical usage, apparently for its own sake, the court concluded that the proposed ads would contain no beneficial information, and "may be detrimental to the society." That is not the exacting scrutiny required where a blanket content prohibition is involved.

3. The court then proceeded to assess the constitutional issue as purely a competition between what it erroneously perceived as valueless content (again, without analysis or even consideration of the interests of decision making citizens) and a claimed state interest to which it might apply judicial notice. An interrelated and compounding error was the court's failure to analyze whether imminent danger exists (as it clearly does not) of the types carefully delineated in the 1970s cases and *Ohralik*.

4. Finally, the Court erred in taking judicial notice of the "present energy crisis," without a detailed analysis of its scope and meaning in relation to the resulting ban, and particularly in light of its summary conclusion that "promotional advertising, if permitted, would only serve to exacerbate the crisis." *In the Matter of Central Hudson Gas & Electric Corp. v. Public Service Comm.*, 47 N.Y. 2d at 110, 417 N.Y.S. 2d at 39. (App. 13a-14a).

CONCLUSION

For the reasons stated above, the order of the Public Service Commission denying the right of New York public utilities to engage in promotional advertising should be held unconstitutional and the decision of the New York Court of Appeals reversed.

/s/ Edward H. Dowd
Attorney for the Amici Curiae
Suite 810
1101 N. 17th N.W.
Washington, D.C. 20036
(202) 296-1683

CERTIFICATE OF SERVICE

I, Myrna P. Field, one of the attorneys for the *Amici Curiae* herein, hereby certify that on the 14th day of January, 1980, I served three copies of the attached brief on the following:

Telford Taylor, Esq.
Taylor, Ferenez & Simon
60 East 42nd St.
New York, New York 10017

Peter H. Schiff, Esq.
Donna Houseman, Esq.
Empire State Plaza
Agency Building #3
Albany, New York 12223

Myrna P. Field
Attorney for the *Amici Curiae*
Mid-Atlantic Legal Foundation and
Donald Powers

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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-565.

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

On Appeal From the Court of Appeals of the State of New York.

BRIEF OF MOBIL CORPORATION AS AMICUS CURIAE.

EDWIN P. ROME,
WILLIAM H. ROBERTS,
1100 Four Penn Center Plaza,
Philadelphia, Pennsylvania. 19103
Attorneys for Mobil Corporation as Amicus Curiae.

Of Counsel:
BLANK, ROME, COMISKY & MCCAULEY,
1100 Four Penn Center Plaza,
Philadelphia, Pennsylvania. 19103

F. W. D. SCHAEFER,
Mobil Corporation,
150 East 42nd Street,
New York, New York. 10017

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF OF MOBIL CORPORATION AS AMICUS CURIAE.

Mobil Corporation ("Mobil") respectfully submits this brief *amicus curiae* [1] urging the Court to reverse the decision of the Court of Appeals of the State of New York, which sustained the Order of the Public Service Commission of the State of New York prohibiting promotional advertising by private, investor-owned electric utilities in New York.

1. Pursuant to Rule 42(2), there have been lodged with the Clerk the written consents of counsel for Central Hudson Gas & Electric Corporation, appellant, and of counsel for the Public Service Commission of the State of New York, appellee, to the filing of this Brief *Amicus Curiae*.

THE INTEREST OF MOBIL CORPORATION.

This case concerns direct interference by the State of New York with First Amendment-protected speech in the form of promotional advertising by private investor-owned utilities. The governmental ban on promotional advertising involved in this case abridges not only the right of expression but the right of prospective and existing residential, commercial and industrial customers for electric service to a free flow of truthful information concerning the availability, pricing and advantages of this service.

Mobil is a Delaware corporation which is principally engaged in business in the United States and international energy industries. Its wholly owned subsidiary, Mobil Oil Corporation ("Mobil Oil"), conducts an integrated international energy business including the exploration, production, transportation, refining and marketing of petroleum, petrochemicals, natural gas and products thereof. The petroleum industry in the United States is currently subject to extensive governmental regulation including price and allocation controls on crude oil and certain refinery products. In 1978, Congress enacted the Natural Gas Policy Act, 15 U. S. C. §§ 3301-3432 and 42 U. S. C. § 7255, which placed price controls on intrastate sales of natural gas that had theretofore been exempt from such control. In addition, under the authority of the Emergency Petroleum Allocation Act of 1973, 15 U. S. C. §§ 751 *et seq.*, and the Economic Stabilization Act of 1970, as amended, 15 U. S. C. § 1026, the Department of Energy and its predecessors have promulgated regulations which place pricing restrictions on refiners of petroleum products, 12 C. F. R., Part 212, Subpart E. Mobil is also subject to regulations issued by the Wage and Price Council under the Act Establishing the Council of Wage and Price Stability, Pub. L. 93-37 and Executive Order 12092,

November 1, 1978, as amended by Executive Order 12161, October 2, 1979. In addition, several states, including New Mexico, Kansas and Texas,[2] treat operators of intrastate pipelines for intrastate shipment of petroleum as public utilities subject to state regulation.

Mobil has a continuing vital interest in preserving, free from governmental interference and proscription, the established right of a business enterprise to advertise and to promote the sale of its products and to communicate on issues vital to its business with its employees, shareholders, annuitants, creditcardholders, suppliers and contractors. The threat of complete prohibition of information advertising (and particularly advertising addressed to issues) by companies engaged in the energy business—illustrated by the action of the Public Service Commission of New York in this case—threatens vital interests of Mobil, as well as the interests of employees, shareholders, annuitants, creditcardholders, suppliers, contractors and consumers to receive information concerning energy supplies and services.

In the absence of a definitive ruling invalidating the New York proscription of promotional advertising, federal and state regulatory agencies which currently have less restrictive policies may enact similar prohibitory regulations which would disadvantage Mobil and would interfere with the free flow of important commercial information to customers and potential customers for energy in various forms.

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2. N. M. S. A. 70-3-1 *et seq.*; Texas Nat. Res. Code §§ 111.181, 111.183; Kan. Stat. § 55-501.

SUMMARY OF ARGUMENT.

I.

In *West Ohio Gas Co. v. Public Utility Commission of Ohio*, 294 U. S. 63 (1935), the Court recognized the necessity and propriety of public utility advertising and in subsequent decisions has held that advertising by business enterprises is within the ambit of the First Amendment. There is no claim in this case that the Public Service Commission's Order is a mere "time, place and manner restriction." There is no claim that promotional advertisements by electric utilities have been forbidden because they are false or misleading in any way. There is no claim that any transactions proposed in the prohibited advertisements would themselves be illegal in any way. Under these circumstances, the Public Service Commission's Order, a blanket pre-publication injunction against the dissemination of truthful commercial information, is an impermissible prior restraint upon First Amendment-protected communication and is in irreconcilable conflict with the First Amendment.

II.

The Public Service Commission's injunction against dissemination of truthful information concerning the issues surrounding alternatives to oil and coal as sources of energy, including electric service, is not directly supported by any compelling State interest sufficient to override the interests of constitutional dimension which protect the free flow of commercial information to consumers and prospective consumers of electric energy.

ARGUMENT.

I. The Public Service Commission Order Is an Impermissible Prior Restraint Upon the Dissemination of Constitutionally Protected Expression.

This appeal is a challenge to the constitutionality of a broad restraint imposed by a formal Order promulgated by the Public Service Commission of New York upon the communication of commercial information—promotional advertising of electric service—admittedly protected by the First Amendment. The formal Order in question is a pre-publication restraint addressed to private, investor-owned electric public utilities in New York and intended to suppress such constitutionally-protected communication solely because of its content and because of the predicted effect of such communication on the public.

The challenged Order, in relevant part, provides (J. S. App. 31a): [3]

> "All electric corporations are hereby prohibited from promoting the use of electricity through the use of advertising. . . . "

The case thus presents, among others, the novel question whether the historic First Amendment prohibition against "prior" or "previous restraints is applicable to invalidate a pre-publication Order preventing the dissemination of truthful commercial information.

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3. References to the "Appendix to Jurisdictional Statement" are abbreviated "J. S. App." herein. The Order also prohibited electric corporations from promoting the use of electricity through the use of subsidy payments not committed prior to the date of the Order and through employee incentives. These aspects of the Order, however, are not challenged in this appeal by appellant, Central Hudson Gas & Electric Corporation.

For the reasons discussed below, it is respectfully submitted that the Order is an impermissible prior restraint and that the judgment of the Court of Appeals of the State of New York upholding the Order should be reversed.

A. Promotional Advertising Is Protected by the First Amendment.

While certain categories of speech such as "fighting words," limited types of obscenity, certain forms of libel and incitement to illegal violence have been held unprotected by the First Amendment, this Court's decisions squarely establish the proposition that truthful advertising enjoys the protection of the First Amendment. *Bates v. State Bar of Arizona*, 433 U. S. 350 (1977); *Linmark Associates, Inc. v. Willingboro*, 431 U. S. 85 (1977); *Virginia State Board of Pharmacy v. Virginia Consumer Council*, 425 U. S. 748 (1976); *Bigelow v. Virginia*, 421 U. S. 809 (1975); *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964).

Speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement; speech likewise is protected even though it is carried in a form that is sold for profit and even though it "may involve a solicitation to purchase or otherwise pay or contribute money." *Virginia Board of Pharmacy v. Virginia Consumer Council*, 425 U. S. 748, 761 (1976); *Buckley v. Valeo*, 424 U. S. 1, 35-39 (1976); *Pittsburgh Press Co. v. Human Relations Commission*, 413 U. S. 376, 384 (1973); *New York Times Co. v. Sullivan*, 376 U. S. 254, 266 (1964).

The decisions of the Court further establish that a commercial advertisement which is "noneditorial" and merely reports a fact falls within the ambit of protection of the First Amendment. *Linmark Associates, Inc. v. Willingboro*, 431 U. S. 85 (1977); *Virginia Board of Pharmacy v.*

Virginia Consumer Council, supra, 425 U. S. at 762; *Bigelow v. Virginia, supra,* 421 U. S. at 822; *Thornhill v. Alabama,* 310 U. S. 88, 102 (1940). Moreover, the circumstance that an advertiser's interest in the dissemination of truthful, factual information to prospective and established customers is a purely economic one "hardly disqualifies him from protection under the First Amendment." *Virginia Board of Pharmacy v. Virginia Consumer Council, supra,* 425 U. S. at 762. The Court has relied on the strong interests of consumers in receiving such information as a basis justifying protection. The Court has noted that "[a]s to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate" and that society has a "strong interest in the free flow of commercial information." 425 U. S. at 763-764. The Court in *Virginia Board of Pharmacy* based this necessary corollary on nothing less than the requirements of a free market economy (425 U. S. at 765):

> "Advertising ° ° ° is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable. ° ° ° And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be

> primarily an instrument to enlighten public decision-making in a democracy, we could not say that the free flow of information does not serve that goal." (Footnote omitted)

This fundamental conception of the nature of the free market system and the conditions essential to its proper operation find support, as well, in the economic basis of the federal antitrust laws. Those laws are designed to protect the free market system from interference to ensure the proper allocation of resources in accordance with the aggregate desires of the people. In contrast, in centrally-controlled economies this process is removed from democratic control and performed by government fiat. As the Court has said, however, the Sherman Act was designed as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade," and it "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pacific Railway Company v. United States,* 356 U. S. 1, 4 (1958).

The economic liberty at stake is essential in a democracy based upon a free market economy. Information is essential to that economic liberty:

> "Under certain conditions competitive prices select the goods to be produced and allocate resources to their production in such a manner that there is no way to improve upon either the choice of productive methods by firms, or the distribution of goods that arises from the purchases of households. There exists

> no rearrangement of the resulting economic configuration that makes one household better off (in view of its preferences) without making another worse off. No further mutually advantageous trades are possible; nor are there any feasible productive processes that will yield more of some desired commodity without requiring a cutback in another. For if this were not so, the situation of some individuals could be made more advantageous without a loss for anyone else. The theory of general equilibrium explains how, given the appropriate conditions, the information supplied by prices leads economic agents to act in ways that sum up to achieve this efficiency. Of course, the requisite conditions are highly special ones and they are seldom if ever fully satisfied in the real world. Moreover, *market failures and imperfections are often serious, and compensating adjustments must be made by the allocation branch. ° ° ° Monopolistic restrictions, lack of information, external economies and diseconomies, and the like must be recognized and corrected.*[4] (Footnote omitted and emphasis supplied)

In this economic system, lack of information causes market failure. If citizens who decide a political issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, they may, by reason of that interference with the thinking process of the community, reach an ill-considered, ill-balanced decision. In the same way, consumers deprived of relevant commercial information may, by reason of censorship of their sources of information, make unwise, ill-considered economic decisions. Like the democratic political process, the free market system depends upon a free-flow

4. J. Rawls, *A Theory of Justice*, 271-272 (1971).

of information—information about the prices, availability, benefits, advantages, and disadvantages of specific goods and services produced by the economic system. In the absence of accurate, up-to-date commercial information, the market system malfunctions as a mechanism for allocation of limited resources in accordance with the aggregate desires and free economic choices of the people. Indeed, the goal of perfect competition is normally defined by reference to the condition of access to complete information concerning the prices, qualities and availability of goods and services. Areeda, *Antitrust Analysis*, 6-25 (2d ed. 1974).

The importance of the free flow of economic information is reaffirmed in the Court's recent decisions invalidating restrictions on commercial advertising. These decisions establish First Amendment protection for information (including paid written advertising) concerning

(1) prices, discounts, rebates and credit terms, *Virginia Board of Pharmacy v. Virginia Consumer Council, supra; Bates v. State Bar of Arizona*, 433 U. S. 350 (1977);

(2) the location where goods or services may be obtained, *Bigelow v. Virginia, supra;* and

(3) availability for purchase, *Linmark Associates, Inc. v. Willingboro, supra;* and

(4) procedures facilitating purchase of advertised goods or services, *Bigelow v. Virginia supra.*

In *Virginia Board of Pharmacy v. Virginia Consumer, supra,* while recognizing the State's powers to regulate the practice of pharmacy in Virginia in the interest of the safety and welfare of the public, the Court invalidated, on grounds of repugnance to the First Amendment, a portion

of a Virginia regulatory statute providing that a licensed pharmacist in Virginia is guilty of unprofessional conduct if he "publishes, advertises or promotes . . . any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription." The Court affirmed the judgment of a three-judge District Court enjoining enforcement of the statutory provision. The opinion recognizes the right of users of prescription drugs to receive information that pharmacists may wish to communicate to them through advertising and other promotional means concerning the prices of such drugs. In support of the holding that such commercial advertising is protected by the First Amendment, the Court underscored the unquestioned value of such information to consumers of drugs and their legitimate entitlement to unfettered access to commercial information on that subject.

In *Linmark Associates, Inc. v. Willingboro, supra,* the Court invalidated a local township ordinance banning the use of "For Sale" and "Sold" signs in connection with the marketing of homes and residential real estate.

In *Bigelow v. Virginia, supra,* the Court reversed the conviction of a Virginia newspaper editor for publishing information concerning the availability of abortion referral services in New York.

In *Bates v. State Bar of Arizona, supra,* the Court invalidated a rule which made the advertising of the prices of legal services by Arizona lawyers a disciplinary infraction subject to censure.

Information advertising by electric utilities, which is prohibited by Order of the Public Service Commission of New York at issue in this case, is commercial information of precisely the same kind which has received First Amendment protection under the Court's decisions. Consumer

interest in the pricing, availability, advantages, disadvantages and efficient use of alternative energy sources has never been greater than at present. Moreover, the fact that aspects of the operation of electric utilities are subject to state regulation does not lessen the need for information which can be provided only by information advertising. Each of the cases in which the Court has invalidated restrictions on advertising involved the misuse of state regulatory powers in areas of economic activity subject to state regulation. The failure to value the interests of consumers, employees, shareholders, annuitants, creditcardholders, suppliers and contractors, the failure to appreciate the degree of competition between alternative sources of energy, and the concomitant need for accurate information were fundamental flaws in the reasoning of the Court of Appeals of New York below. Thus, the Court of Appeals wrote (J. S. App. 13a):

> "In view of the noncompetitive market in which electric corporations operate, it is difficult to discern how the promotional advertising of electricity might contribute to society's interest in 'informed and reliable' economic decisionmaking. Consumers have no choice regarding the source of their electric power; the price of electricity simply may not be reduced by competitive shopping."

However, competition within the regulated sectors of the economy providing alternative sources of energy such as electric power, natural gas, and oil has been recognized by this Court. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 403 (1978). Indeed, in *West Ohio Gas Company v. Public Utilities Commission of Ohio*, 294 U. S. 63 (1935), the Court took judicial notice of competition between electric power, natural gas and oil as the basis for holding that promotional advertising by public

utilities is a proper and necessary activity, the reasonable expenses for which are chargeable to customers for rate-making purposes. Mr. Justice Cardozo wrote (294 U. S. at 72):

> "The suggestion is made that there is no competition. We take judicial notice of the fact that gas is in competition with other forms of fuel, such as oil and electricity. A business never stands still. It either grows or decays. Within the limits of reason, advertising or development expenses to foster normal growth are legitimate charges upon income for rate purposes as for others. Consolidated Gas Co. v. Newton, supra, 267 F. 253. When a business disintegrates, there is damage to the stockholders, but damage also to the customers in the cost or quality of service."

As the Court has acknowledged, the propriety of promotional advertising by public utilities rests, in part, upon that residual competition between alternative sources of energy which is not eliminated even in the regulated environment in which public utilities operate. Moreover, competition between these alternative energy sources, which the Court judicially noticed in the *West Ohio Gas* case, was acknowledged in this case by the Public Service Commission. The Chairman of the Commission, the Honorable Alfred E. Kahn, noted (J. S. App. 49a):

> ". . . I also believe in competition as a form of economic organization, wherever it is feasible. And for competition to be effective some sales promotion is necessary. Even if that were not so as a general matter, it would in my judgment be inescapably so when there compete in the market two rivals, one

> of whom is free to advertise his wares and the other is—under our present policies—not."

Other commentators have also observed that competition exists, even within the regulated sector, between electric power, oil and natural gas.[5]

The conclusion of the New York Court of Appeals below that promotional advertising of electricity by regulated electric utilities is not protected by the First Amendment *because there is no competition, at least in their respective service areas, among suppliers of electric power* is based upon an excessively narrow view of competition which fails to recognize and preserve existing competition between suppliers of alternative forms of energy. It is totally at odds with decisions of this Court and even with the factual assumptions of the Chairman of the Public Service Commission in this case.

The importance of information advertising as a means of informing actual and potential customers of the rates, availability and advantages of electric energy in comparison with natural gas and oil, is not, therefore, eliminated by the fact that certain aspects of the industry are subject to state regulation. Information advertising is desirable to the extent it helps the public make more intelligent choices between alternatives and advance a utility along its declining cost curve toward lower resultant rates for all. The command of the First Amendment applies, therefore, with equal force to the information advertising at issue in this case as it does to the types of promotional advertising which have previously been held to be protected by the First Amendment.

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5. *See*, Shenefield, "Antitrust Policy Within the Electric Utility Industry," 16 Antitrust Bulletin 681 (1971); Pace, "Relevant Markets and the Nature of Competition in the Electric Utility Industry," 16 Antitrust Bulletin 725 (1971); Landon and Wilson, "An Economic Analysis of Combination Utilities," 17 Antitrust Bulletin 237, 257-260 (1972).

B. The Public Service Commission's Order Operates as an Impermissible Prior Restraint.

The First Amendment prohibition against prior restraints, one of the most venerable absolutes in the field of constitutional law, completely proscribes any direct restraint upon constitutionally-protected speech which operates prior to publication to prevent the dissemination of opinion, thought or information. "[I]t has been generally, if not universally, considered that it is the chief purpose of the [First Amendment's] guaranty to prevent previous restraints upon publication." *Near v. Minnesota ex rel. Olson,* 283 U. S. at 713, 716-717; *Patterson v. Colorado ex rel. Attorney General,* 205 U. S. 454, 462 (1907); *Grosjean v. American Press Co.,* 297 U. S. 233, 249 (1936); *cf. Nebraska Press Association v. Stuart,* 427 U. S. at 588-589 (concurring opinion of Mr. Justice Brennan).

Prior restraints are "the essence of censorship." *Near v. Minnesota ex rel. Olson, supra,* 283 U. S. at 713. The First Amendment, therefore, "accords greater protection against prior restraints than it does against subsequent punishment for particular speech." *Nebraska Press Assn. v. Stuart, supra,* 427 U. S. at 589 (concurring opinion of Mr. Justice Brennan); *Carroll v. Princess Anne,* 393 U. S. 175, 180-181 (1968). As the Court explained in *Southeastern Promotions, Ltd. v. Conrad,* 420 U. S. 546, 559 (1975): "[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable."

None of the narrow "exceptions" to the prohibition against prior restraints is applicable here. *See, Nebraska*

Press Assn. v. Stuart, supra, 427 U. S. at 590-591 (concurring opinion of Mr. Justice Brennan). Two such "exceptions," noted in the Court's opinion in *Near v. Minnesota ex rel. Olson*—the case of restraints to enforce "the primary requirements of decency" against obscene publications and of "incitement to acts of violence and the overthrow by force of orderly government"—have since been interpreted as examples of "speech" that is not encompassed within the First Amendment. The third "exception" mentioned in *Near,* where speech meriting First Amendment protection might be suppressed in advance of publication because of the requirements of "military security" during times of war, has only been adverted to in dictum and has never served as the basis for upholding a prior restraint against publication of constitutionally protected materials. It is clearly inapplicable in this case.

None of the Court's recent decisions upholding First Amendment protection for advertising has involved the operation of a drastic prior restraint such as the Public Service Commission Order at the heart of this case. *Bigelow* involved a Virginia criminal statute imposing punishments *after* publication of the proscribed advertising. In *Bates* and *Virginia Board of Pharmacy,* the challenged restraints were disciplinary rules carrying *subsequent* sanctions for their violation. *Linmark Associates, Inc.* likewise involved a township ordinance prohibiting erection of "For Sale" and "Sold" signs.

In *Virginia Board of Pharmacy v. Virginia Consumer Council, supra* 425 U. S. at 771 n. 24, the Court intimated that the First Amendment prohibition against prior restraints is equally applicable to advertising except in the case of false advertising. Noting that "the greater objectivity and hardiness of commercial speech may make it less necessary to tolerate inaccurate statements for fear

of silencing the speaker," the Court went on to state (425 U. S. at 772 n. 24):

> "They may also make inapplicable the prohibition against prior restraints. Compare New York Times Co. v. United States, 403 U. S. 713 (1971), with Donaldson v. Read Magazine, 333 U. S. 178, 189-191 (1948); FTC v. Standard Education Society, 302 U. S. 112 (1937); E. F. Drew & Co. v. FTC, 235 F. 2d 735, 739-740 (CA 2d 1956), cert. denied, 352 U. S. 969 (1957)."

The possible exception for *inaccurate* advertising, which the Court in footnote 24 of *Virginia Board of Pharmacy* intimated might be recognized, has no application to this case. Because of the preclusive effect of the Order of the Public Service Commission no promotional advertisement has been published. The truthfulness of proposed promotional advertisement must be presumed. Consequently, the Public Service Commission's Order is a clear and direct violation of the First Amendment's absolute prohibition against prior restraints.

The Order is a broad and general injunction directed, not a specific speech, but at a complete range of expression. As the Court below noted, "[T]his order works a direct curtailment of expressional activity: *an entire category of speech is prohibited because of its potential impact upon the society.*" (J. S. App. 10a). The Order is based on two layers of speculation: (1) speculation concerning the *content* of prospective speech which is banned in general terms; and (2) speculation as to the *consequences* of the speech to the extent its content might influence the public which receives and hears or reads it. Moreover, the constitutional infirmities of this Order by their very nature could not be cured by prompt, intervening judicial

review. Those cases where speech can be promptly reviewed by judicial authority to determine whether it is, for example, obscene and outside the protection of the First Amendment, are therefore inapposite. Here, as in *New York Times Co. v. United States,* 403 U. S. 713 (1971), only actual publication of the speech in question could determine the issue whether the predicted consequences would result.

It is well-settled that any prior restraint bears "a heavy presumption against its constitutional validity." *New York Times Co. v. United States, supra,* 403 U. S. at 714. That burden has not been and cannot be satisfied in this case. The Order is a classic prior restraint upon speech which is clearly within the ambit of protection of the First Amendment. The Public Service Commission's blanket Order banning *all* promotional advertising is based on conclusory predictions of a highly speculative nature, wholly unsupported by any specific evidence, so far as can be determined from the record. The conclusions rest on "factors unknown and unknowable." *Nebraska Press Assn. v. Stuart, supra,* 427 U. S. at 563. No satisfactory showing has been made that promotional advertising is clearly liable to cause any direct and dangerous interference with serious governmental interests.

Moreover, there has been no showing on this record to sustain another aspect of the heavy burden of supporting a prior restraint. No explicit determination has been made and supported that measures short of an order restraining *all* information or issue advertising by electric utilities would not have been sufficient to accomplish the regulatory goal sought to be advanced by silencing the electric utilities in New York. No showing has been made that direct limitation by the Commission on certain new or additional uses of electric service would not have been sufficient to protect the interests said to be jeopardized by

promotional advertising. No showing has been made that rate increases for certain uses or rate increases for service usage during certain times of the day would not have been a satisfactory alternative short of a blanket injunction against *all* promotional advertising. No showing has been made that a ceiling limitation upon expenditures for promotional advertising (if constitutionally permissible) would not have been a satisfactory alternative to *total* prohibition. In short, no showing has been made to eliminate as feasible alternatives to total prohibition less restrictive means of regulation in this area touching the rights to disseminate and to receive truthful information of interest to the public.

For all of these reasons, the Order of the Public Service Commission squarely conflicts with the First Amendment. It is respectfully submitted that the judgment below should be reversed and the Order annulled.

II. No Compelling State Interest Justifies a Total Ban on Promotional Advertising by Electric Utilities.

In *West Ohio Gas Company v. Public Utilities Commission of Ohio*, 294 U. S. 63 (1935), the Court specifically upheld the propriety of promotional advertising of public utility services. The Court held that expenditure of reasonable sums for promotional advertising by utilities was a management prerogative. Moreover, addressing an issue not involved in the present appeal, the Court there held that reasonable expenditures for this purpose may properly be charged to rate-payers for ratemaking purposes. As demonstrated above, such promotional advertising also enjoys the protection of the First Amendment. Arrayed against these interests of substantial constitutional dimension are the insubstantial justifications offered in support of the Order.

The Commission itself has stated that "the amount of money spent on advertising by major utilities in this State is a very small portion of their total revenues . . ." (J. S. App. 35a). A principal motivation for the Commission's action in completely halting even these relatively modest expenditures by New York utilities is evidenced by the Commission's comment that "the proper extent and *content* of such advertising . . . is *an increasingly controversial issue.*" (J. S. App. 35a). However, protected speech may not be suppressed simply because various other private interest groups vociferously dissent from the "content" of such advertising. No other compelling state interest supports the total suppression, prior to publication, of *all* forms of "promotional advertising."

In its Opinion upholding a prior restraint on all "promotional advertising" by electric utilities, the New York Court of Appeals adverted to "the present energy crisis" (J. S. App. 13a-14a). Indeed, the Court took *judicial notice* of energy shortages. Based on this lone factual observation, the Court below appears to have reasoned along the following lines:

> 1) "Public utilities . . . have been regulated and franchised to serve the commonwealth" (J. S. App. 13a).
>
> 2) "[T]he realities of the situation all but dictate that a utility be granted a monopoly status" and the withdrawal of "the unrestricted right of competition between corporations occupying ° ° ° the public streets ° ° ° and supplying the public with their products or utilities" (J. S. App. 13a).
>
> 3) The purpose of regulation is "[t]o protect against abuse of this superior economic position" (J. S. App. 13a).

4) Therefore, electric utilities operate in a "non-competitive market" (J. S. App. 13a).

5) Since there is no competition, each electric utility enjoys a monopoly in its service area; advertising, under these circumstances, cannot aid in product or price competition.

6) Since promotional advertising is ineffectual to shift existing demand from one source of electric power to another, the only other useful function of promotional advertising would be to *create* demand for electric energy where none previously existed.

7) Additional use of electric energy must necessarily be supported by increased generation of electricity, which, in turn, requires consumption by utilities of additional fuel.

8) Fuel shortages and the need to conserve energy resources make additional consumption of fuel for generation of electric power contrary to the public interest.

9) Promotional advertising of electric service would be effective in causing increased consumption of electric power and would therefore lead to a consequence contrary to the public interest.

Placing exclusive reliance on this Court's decision in *Ohralik v. Ohio State Bar Assn.*, 436 U. S. 447 (1978), the New York Court of Appeals upheld the total ban on promotional advertising by electric utilities.

This argument is a *non sequitur*. Regulation predicated on the need to prevent the abuse of a state-imposed monopoly of a single form of energy within a particular service area here is extended to *suppress* any remaining

competition, including (A) competition between electric utilities located in different geographic service areas for a new industrial customer choosing a site for a new facility, (B) competition between electric utilities and suppliers of *other* forms of energy within the same service area for industrial, residential or commercial customers whose demand is constant and will inevitably be supplied by one source or another, (C) competition between suppliers of different forms of energy in new residential projects, and (D) competition or promotional activities to sell electric service to industrial customers which have the capability to generate their own energy and are faced with the economic decision whether to purchase energy or to generate it themselves by possibly less fuel-efficient methods. The need for conservation of natural resources does not eliminate the occasion for these private economic decisions on the basis of which the allocation of resources in a market system—even one subject in some sections to state regulation—is made. Notwithstanding energy shortages, construction of new homes requiring heating and energy systems continues. Purchase and use of new appliances for food storage and preparation continue. Location and construction of new industrial and commercial facilities continues. The importance of maintaining a free flow of up-to-date and accurate commercial information so that the economic decisions involved in these activities may be well-considered and sound decisions is not diminished by the need to conserve energy. In these circumstances, consumers need truthful information concerning the availability, prices and advantages of electric service and of the competing alternative forms of energy.

Finally, in support of its decision to uphold the Public Service Commission's Order in this case, the Court below relied upon an expansive reading of this Court's decision

last Term in *Ohralik v. Ohio State Bar Assn.*, 436 U. S. 447 (1978). Essentially, the Court below erroneously read and misapplied *Ohralik* as supporting the proposition that "a particular mode of advertising which would not well serve the social interest in informed decisionmaking, such as in-person solicitation, may constitutionally be banned." (J. S. App. 12a).

Ohralik, dealing with in-person solicitation by attorneys, involved the constitutional protection of advertising and promotional activities in the professions—a context which the Court has repeatedly emphasized is unique. *Bigelow v. Virginia, supra*, 421 U. S. at 825 n. 10; *Virginia Board of Pharmacy v. Virginia Consumer Council, supra*, 425 U. S. at 773 n. 25; *Bates v. State Bar of Arizona, supra*, 433 U. S. at 365 n. 17. Moreover, in *Ohralik* the Court was concerned with issues unrelated to paid written advertising and noted the "significant differences" between public advertisements of the type involved in this case and in-person solicitation, 436 U. S. at 457. The in-person solicitation of clients—at the hospital room or the accident site, or in any other situation—breeds undue influence, as the Court observed. In-person solicitation presented dangers of overreaching and misrepresentation not encountered in newspaper announcement advertising. None of these dangers is present in this case, where newspaper advertising is banned. Moreover, while in *Ohralik* the in-person solicitation involved speech, speech was only a "subordinate component." 436 U. S. at 457. The Court specifically noted that "[u]nlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response without providing an opportunity for comparison or reflection." 436 U. S. at 457. None of these aspects of in-person solicitation is present in this case. Properly con-

sidered in the light of the unique factual circumstances involved in in-person solicitation, the holding of *Ohralik* does not support a blanket prior restraint upon promotional advertising by electric utilities.

Quite apart from interfering with these important functions of utility advertising, the Commission's ban on promotional advertising impedes advertising designed to shift customer usage of electric service from peak-load periods to non-peak-load periods. While Time-of-Day (TOD) pricing of utility service has not yet been uniformly implemented in this country, experience with this new pricing concept in electric utility marketing is sufficient to demonstrate that consumers adequately informed about the nature of this pricing system are responsive to these fuel-saving techniques.[6] The studies of customer responsiveness to time-of-day rates in electric utility pricing underscore "the need for extensive consumer education in the areas of load management and time-of-day rates . . . if we hope to gain customer acceptance."[7] The need for "extensive consumer education" is no less critical where electric utilities such as Central Hudson Gas & Electric Corporation desire to promote off-peak consumption and energy-saving electrical uses and devices, including the heat pump.

The effect of the Commission's Order, however, has been to silence effective communication on these important subjects between electric utilities and their customers in New York.

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6. *See*, Malko and Simpson, "Time-of-Use Pricing in Practice: Some Recent Regulatory Actions," in *Assessing New Pricing Concepts in Public Utilities*, Proceedings of the Institute of Public Utilities, Ninth Annual Conference, 1978 MSU Public Utilities Papers 399 (1978); Kennedy, "Peak Load Pricing and Industrial Consumers' Response," *id.* at 420-429.

7. Holeman, "Mandatory Time of Day Rates: The Arkansas Power & Light Company Experiment," *ibid.* at 430, 440.

There is no claim in this case that the prohibition of information advertising is a mere "time, place and manner" restriction; the prohibition in this case is aimed directly at the content of the communication in question. There is no claim in this case that the advertising is forbidden because it is false or misleading in any way. Nor is there any claim that the transactions proposed in the forbidden advertising are themselves illegal in any way. The special problems of the electronic broadcast media are not implicated in this case.

Here, as in *Virginia Board of Pharmacy v. Virginia Consumer Council, supra,* the question is "whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients" and whether that suppression of communication may constitutionally be accomplished by prior restraint.

CONCLUSION.

The Public Service Commission's Order is designed as a form of indirect control over the lawful conduct of residents of New York. The direct purpose of the Order is to prevent the dissemination of truthful information because of its contents. The communication is prohibited because it is believed that its content will be acted upon by recipients, and the effects of those actions are feared and sought to be prevented even though those actions would be lawful. This prior restraint is the keystone of a paternalistic effort by government to keep the people ignorant of facts which are of interest to them as a means of controlling their lawful behavior. The Order is, thus, fundamentally at odds with the First Amendment. While the Public Service Commission may possess the power directly to affect the actions of consumers by proper regu-

lation of the electric utilities subject to its jurisdiction, it is, by the command of the First Amendment, without power to achieve its objectives indirectly by completely banning dissemination of the information and opinion which citizens are entitled to receive.

For these reasons, it is respectfully submitted that the Judgment of the Court of Appeals should be reversed with instructions to annul the Order of the Public Service Commission of the State of New York.

Respectfully submitted,

EDWIN P. ROME,
WILLIAM H. ROBERTS,
1100 Four Penn Center Plaza,
Philadelphia, PA 19103
(215) LO 9-3700
Attorneys for Mobil Corporation as Amicus Curiae.

Of Counsel:

BLANK, ROME, COMISKY & MCCAULEY,
1100 Four Penn Center Plaza,
Philadelphia, PA 19103

F. W. D. SCHAEFER,
Mobil Corporation,
150 East 42nd Street,
New York, New York. 10017

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